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Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction under the Equal Footing Doctrine vs. Tribal Sovereignty

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INDIAN RIGHTS TO LANDS UNDERLYING NAVIGABLE WATERS: STATE JURISDICTION UNDER THE EQUAL FOOTING DOCTRINE VS. TRIBAL SOVEREIGNTY

I. INTRODUCTION

A substantial portion of the United States water reserves is located adjacent to and included in Indian reservations.[1] Many reservations were established near bodies of water because of Indian dependence on water for transportation and food.[2] Since water is such a valuable resource to the Indian and non-Indian community alike, there has been considerable litigation and analysis concerning tribal water rights.[3] However, comparatively little attention[4] has been given to the rights of Indians in beds[5] and tidelands[6] of lakes[7] and watercourses[8] which border or traverse reservations.

Obviously, ownership in beds or tidelands can confer significant economic, social, and political benefit. For example, some underlying lands contain such valuable resources as oil and gas.[9] Besides revenue from natural resources, the owner may be entitled to revenue from dam projects located on the body of water.[10] The owner of the underlying land may be able to determine whether there is access to the water for recreational and

1. Dellwo, *Indian Water Rights — The Winters Doctrine Updated,* 6 GONZ. L. REV. 215, 216 (1971).

2. Water has always been a mainstay of the Indian economy, by providing a primary source of food and supporting agriculture. 1 AMERICAN INDIAN POLICY REV. COMM'N FINAL REPORT 334-36 (1977).

3. Arizona v. California, 373 U. S. 546 (1963). *See, e.g.,* Winters v. United States, 207 U. S. 564 (1908); United States v. Athanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U. S. 988 (1957); United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939). Numerous law review articles have been written on the subject of Indian water rights. *E.g.,* Dellwo, 6 GONZ. L. REV., *supra* note 1; Veeder, *Winters Doctrine Rights,* 26 MONT. L. REV. 149 (1965).

4. Although there are several significant cases involving Indian title to underlying lands, this issue has only been dealt with briefly in legal journals. *See* Note, *Indian Claims in the Bed of Oklahoma Watercourse,* 4 AM. INDIAN L. REV. 83 (1976); Dellwo, 6 GONZ. L. REV., *supra* note 1, at 234-35.

5. The bed of a body of water has been generally defined as that soil so usually covered by water that it is wrested from vegetation. "It is the land upon which the waters have visibly asserted their dominion. . . ." Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906).

6. Tidelands are those lands alternately covered and uncovered by the rise and fall of the tide, the land between high tide and low tide. BALLANTINE'S LAW DICTIONARY 1277 (3rd ed. 1969).

7. A lake is a "reasonably permanent body of water substantially at rest in a depression in the surface of the earth." RESTATEMENT (FIRST) OF TORTS § 842 (1939).

8. A watercourse is a "stream of water and its channel, both of natural origin, where the stream flows constantly or recurrently on the surface of the earth in a reasonably definite channel." *Id.* § 841(1).

9. *See, e.g.,* United States v. Champlin Refining Co., 156 F.2d 769, 772 (10th Cir. 1946), *cert. granted,* Oklahoma v. United States, 329 U. S. 711, *aff'd per curiam,* 331 U. S. 788 (1947).

10. *See, e.g.,* Montana Power Co. v. Federal Power Comm'n, 298 F.2d 335, 340 (D. C. Cir. 1962).

commercial purposes,[11] in particular access for fishing. When accretion,[12] avulsion,[13] or reliction[14] occurs, the ownership of the newly uncovered land becomes a vital issue and may be decided on the basis of title to the bed.[15] Ownership of the bed and tidelands can also have important judicial consequences by dictating whether the federal, state, or tribal court has subject-matter jurisdiction over a particular cause of action.[16]

With the ever-increasing recognition by Indian tribes of the economic and social benefit to be gained through establishing title to lands underlying waters and with the increasing legal sophistication of the Indian community, litigation in this area of Indian law will undoubtedly significantly increase and analysis of the issues involved is relevant and necessary.

At the outset it is important to note that the issue of ownership to lands underlying navigable waters concerns the clash between state and tribal rights, two divergent doctrines as to ownership having developed. On one hand there is the presumption that lands underlying navigable[17] waters pass to the state upon its admission into the Union because of the constitutional doctrine of equal footing.[18] This presumption was interpreted to require that

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11. *See* Dellwo, 6 GONZ. L. REV., *supra* note 1, at 234.

12. Accretion has been defined as "an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived." Jefferis v. East Omaha Land Co., 134 U. S. 178, 193 (1890).

13. In contrast to accretion, avulsion is the process by which the river changes its course in an impetuous and unpredictable manner. Omaha Indian Tribe, Treaty of 1854 v. Wilson, 575 F.2d 620, 634 (8th Cir. 1978), *rev'd other grounds,* Wilson v. Omaha Indian Tribes, ____ U.S. ____, 47 U.S.L.W. 4748 (U.S. 1979).

14. Reliction is an increase in land by a permanent withdrawal or retrocession of the lake, sea, or river. Hammond v. Shepard, 186 Ill. 235, 242, 57 N.E. 867, 868 (1900).

15. *See, e.g.,* Omaha Indian Tribe, Treaty of 1854 v. Wilson, 575 F.2d 620 (8th Cir. 1978), *rev'd other grounds,* Wilson v. Omaha Indian Tribes, ____U.S.____, 47 U.S.L.W. 4748 (U.S. 1979).

16. *See, e.g.,* United States v. Finch, 548 F.2d 822 (9th Cir. 1976), *vacated, per curiam,* 433 U. S. 676 (1977).

17. There are three federal standards of navigability. The first of these is waters which give rise to federal jurisdiction because of the commerce clause, *i.e.,* they are capable of use as an interstate highway. These waters are called navigable waters of the United States. *See* United States v. Appalachian Power Co., 311 U. S. 377 (1940). There is also a federal standard of navigability arising out of the admiralty jurisdiction of the United States. *See* Lucky Lindy Dragon v. United States, 76 F.2d 561 (5th Cir. 1935). The federal standard which is relevant to this article is the federal title test, that is, when the United States or the tribe is a party to the action and when the land is being claimed by the state by virtue of the equal footing doctrine, navigability is a federal question to be determined by the federal standard which is navigability in fact. Navigability in fact is defined as when the watercourse is susceptible of being used in its natural or ordinary condition for trade or travel, even though the waters are not capable of use in navagation in interstate or foreign commerce. United States v. Holt State Bank, 270 U. S. 49, 55-56 (1926). Navigability in some cases may be a matter of state property law, particularly when the litigation involves a dispute between two private parties and the issue is the vesting of property rights subsequent to statehood. *See* Shore v. Shell Petroleum Corp., 55 F.2d 696 (D. Kansas 1931), *aff'd,* 60 F.2d 1 (10th Cir.), *cert. denied,* U.S. 656 (1932). If the United States or the Indian tribe is a party in a later suit which involves the navigability of a watercourse previously decided on the basis of state law, the principal state court decision is not binding on the United States or the tribe, because they were not parties to the original suit and navigability is now a question of federal law since it involves a vesting prior to statehood. 156 F.2d at 774.

18. Shively v. Bowlby, 152 U. S. 1, 26-31 (1894).

evidence of express or plain intent to the contrary be present in order to overcome the presumption.[19] On the other hand, disposals to Indians have historically been interpreted more liberally by the courts because of the doctrines of tribal sovereignty and the Federal-Indian trust relationship and the fact that disposals to Indians by treaty, statute, or executive order are often very ambiguous, particularly as to the boundaries of the reservations. Given the legal significance of this divergence in the law and the growing economic interests at stake, it is of timely importance to examine the issue of state versus tribal ownership of lands underlying navigable waters.

The purposes of this note are as follows: first, to discuss the development of and rationale for the presumption that lands underlying navigable waters pass to the state upon its admission into the Union; secondly, to analyze the important cases, with special emphasis on Supreme Court cases, in which there has been an issue of federal disposal of lands underlying navigable waters to Indian tribes; and thirdly, in conclusion, to suggest, in light of the doctrines of tribal sovereignty and the trust relationship, what language and circumstances should be necessary in order for a court to find a disposal of these lands to Indian tribes, and in particular whether the presumption of state ownership should be applicable.

II. THE SHIVELY PRESUMPTION THAT LANDS UNDERLYING NAVIGABLE WATERS PASS TO THE STATE UNDER THE EQUAL FOOTING DOCTRINE.

Early in the history of the United States, the Supreme Court established that states are entitled to lands below the high water mark of navigable waters within their respective jurisdictions, and that these lands could not be afterwards granted away by the Congress of the United States.[20] This is in sharp contrast to the general rule regarding non-navigable waters, that title to the bed remains in the United States, unless the federal government has conveyed it by treaty, statute, or patent.[21]

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19. United States v. Holt State Bank, 270 U. S. 49, 55 (1926).

20. Pollard's Lessee v. Hagan, 44 U. S. (3 How.) 238, 251 (1845).

21. Generally, if there has been a grant by the United States of the lands bounded on the non-navigable stream, and there is no intent shown to restrict the conveyance to the upland or to specifically include the underlying land, the grant will be construed and given effect according to the law of the state in which the land lies. Oklahoma v. Texas, 258 U. S. 574, 594 (1922). In many states, the common law rule prevails that a grant to the uplands of a non-navigable stream includes the adjacent land to the middle of the lake or stream. *See* United States v. Oregon, 295 U. S. 1, 27 (1935); Scott v. Lattig, 227 U. S. 229, 242 (1913).

The presumption of state ownership to shores and beds of navigable waters is based on the constitutional[22] doctrine that states admitted subsequent to the formation of the Union were admitted on an equal footing with the original states.[23] While the equal footing doctrine is not designed to wipe out the diversities in economic stature between the states,[24] it has been interpreted to require parity with regard to political standing and sovereignty.[25] However, property rights and sovereignty are closely intertwined. The original states of the Union, by virtue of the Revolution and their sovereignty, succeeded to the English Crown's title and dominion to land underlying navigable waters.[26] Thus, it was held that "to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves."[27]

The theory behind this holding has been expressed well by several Justices of the Supreme Court. Justice Stone wrote, "Dominion over navigable waters and property in the soil. . . are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged. . . ."[28] Justice Curtis much earlier noted that, "[T]his soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights."[29] In the same vein Justice Bradley stated that the title to shore and lands under tide water "is regarded as incidental to the sovereignty of the state.

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22. The doctrine does not rest on any express provision of the Constitution, but rather on the interpretation given the Constitution by the Supreme Court that this country is a union of political equals. Case v. Toftus, 39 F. 730, 732 (C.C.D. Oregon 1889). In addition, legislation regarding the admission of a state into the Union often included an equal footing clause. E.g., United States v. Texas, 339 U.S. 707, 714 (1950).

23. 152 U. S. at 26.

24. 339 U. S. at 716.

25. "The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government." Case v. Toftus, 39 F. at 732.

26. Under the English common law, title to tide waters and lands below high water mark was in the King because their natural and primary use was public in nature. This rule of law was also applicable to the English claims under the right of discovery, with the minor addition that navigable waters, as well as tide waters were to be included. 152 U. S. at 14. While Indian tribes had the right of occupancy, the absolute right of property and dominion belonged to the European nations by virtue of discovery. Johnson v. McIntosh, 21 U. S. (8 Wheat.) 240, 253-54 (1823). After the American Revolution, all the rights of the Crown succeeded to the states by virtue of their sovereignty, subject to the rights surrendered to the national government. These rights of the states included title and dominion to lands underlying navigable waters, subject to the right of the United States under the commerce clause. Martin v. Waddell, 41 U. S. (16 Pet.) 234, 263 (1842).

27. United States v. Texas, 339 U. S. at 716.

28. United States v. Oregon, 295 U. S. at 14.

29. Smith v. Maryland, 59 U. S. (18 How.) 71, 74 (1855).

. . ., held in trust for the public purpose of navigation and fishery.''[30]

Some early courts expressed in *dicta* the view that as a result of the equal footing doctrine, title in land below high water mark could not be granted away by the United States before the admission of the state into the Union.[31] However, the Court in *Shively v. Bowlby*[32] established the principle that the United States can dispose of lands underlying navigable waters, stating as follows:

> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in territorial condition. . . .
>
> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory.[33]

Having recognized this right of the federal government to dispose of lands underlying navigable waters, the Court also established a presumption against such disposal.[34] It is significant that the *Shively* Court was concerned with a dispute between two individuals, one claiming title from the State of Oregon, the other claiming by patent from the United States.[35] Thus, the Court voiced its concern that lands underlying navigable waters should not be disposed ''piecemeal to individuals. . ., but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall become a completely organized community.''[36]

30. Hardin v. Jordan, 140 U. S. 371, 381 (1891).
31. *Id.* at 381; Pollard's Lessee v. Hagan, 44 U. S. (3 How.) at 259.
32. 152 U. S. 1 (1893).
33. *Id.* at 48 (citations omitted).
34. *Id.*
35. *Id.* at 9.
36. *Id.* at 50.

This presumption of state title to submerged lands has been reaffirmed in the Federal Submerged Land Act[37] which provides that title to land beneath navigable water vests in the respective state in which the land is located.[38] However, there are specific exemptions from the act for underlying lands which were lawfully conveyed by the United States to any person[39] or held by the United States for the benefit of Indians.[40] This Act is merely a confirmation of states' existing rights in the bed under the equal footing doctrine, creating no new rights for the states.[41]

If there has been no disposal by the federal government prior to statehood, the state may use or dispose of the bed as it chooses, as long as there is no substantial impairment of the public interest in the water and subject to federal rights under the commerce clause.[42] Thus state law may significantly vary as to what private rights are granted in beds of navigable waters.[43]

Outside the area of Indian law, there have only been a few special instances in which the United States has disposed of lands underlying navigable waters before a territory became a state.[44] These special instances have involved the United States withdrawing the navigable water and the adjoining underlying land for the "public purpose"[45] of creating and establishing wildlife refuges.[46]

Thus, the *Shively* presumption has almost exclusively been applied to and interpreted in cases involving possible disposals to Indian tribes.

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37. 43 U.S.C. § § 1301, 1303, 1311-1315 and accompanying notes (1976).
38. *Id.* § 1311 (a).
39. *Id.* § 1301 (f).
40. *Id.* § 1313 (b).
41. Bonelli-Cattle Co. v. Arizona, 414 U. S. 313, 324 (1973).

42. Illinois Cent. R. R. v. Illinois, 146 U. S. 387, 452-53 (1892). This is one of the rare cases in which the Court revoked the state grant to a private party, because the disposal by the state violated the doctrine that the state holds the title to the tidelands in trust for the people of the state.

43. North Dakota law provides that unless a different intent is expressed in the grant, owners of upland take to the edge of the low water mark. N. D. CENT. CODE § 47-01-15 (1978). Justice Teigen noted that disposal of title by the state is always subject to the rights of the public in the waters. Perry v. Erling, 132 N.W.2d 889, 902 (N. D. 1965) (Teigen, J., concurring).

44. State v. Placid Oil Co., 274 So.2d 402, 413 (La. Ct. of App. 1972), *cert. denied,* 419 U. S. 1110 (1975).
45. 152 U. S. at 48.

46. *See* Udall v. Tallman, 380 U.S. 1 (1965); United States v. Alaska, 423 F.2d 764 (9th Cir.), *cert. denied,* 400 U. S. 967 (1970). The author was unable to locate a case in which the court found that there was disposal to "perform international obligations." 152 U. S. at 48. However, in at least one case, the argument was made that there was a special grant in order to fulfill the obligation of the United States under the Treaty of Guadalupe Hidalgo. The Court summarily rejected that argument however. Mann v. Tocoma Land Co., 153 U. S. 273 (1894).

III. CASE LAW

The case law in this area will be approached from a historical perspective, with particular emphasis on the two most significant Supreme Court cases, *United States v. Holt State Bank*[47] and *Choctaw Nation v. Oklahoma.*[48]

A. PRE-HOLT CASES

Within ten years of *Shively* the Ninth Circuit[49] on the basis of *Shively*'s doctrine that the United States can grant rights to underlying lands, held that there had been a congressional disposal of tidelands to an Indian settlement in Alaska.[50] The court found it persuasive that a congressional act establishing a civil government explicitly prohibited disturbance of Indian use and possession and that it was well known that the tidelands were essential for the fishing needs of the Indians.[51]

The two Supreme Court cases during this period also found the fishing needs of the Indian community to be determinitive as to whether there was a disposal.[52] The Court in *Donnelly v. United States*[53] expanded the rule of *Shively,* holding that the river bed can be granted by executive order as well as by an act of Congress.[54] The Court construed the executive order[55] which extended the reservation to include the Klamath River bed as well as the upland by applying a "reasonable language" canon of construction, noting the fishing needs of the reservation. However, this decision is limited in its application because the Court did not specifically base its holding on a finding that the stream was navigable in fact.[56]

47. 270 U. S. 49 (1926).

48. 397 U. S. 620 (1970).

49. Many of the cases to be discussed are in the Ninth Circuit because of the large number of Indian reservations located in this area of the country.

50. Heckman v. Sutter, 119 F. 83 (9th Cir. 1902).

51. *Id.* at 88. Section 8 of the Act of May 17, 1884, stated that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." Act of May 17, 1884, ch. 53, 23 Stat. 24.

52. Alaska Pacific Fisheries v. United States, 248 U. S. 78 (1918); Donnelly v. United States, 228 U. S. 243 (1912).

53. 228 U.S. 243 (1912). The issue in *Donnelly* was the validity of a conviction of a white man for the murder of an Indian on the Klamath River within the Hoopa Valley Reservation. Since the murder had occurred on the river itself, there was a question whether the bed of the Klamath was Indian country so as to establish federal jurisdiction. *Id.* at 255.

54. *Id.* at 258-59. Previously, a Washington district court held that title to shore lands was only valid by virtue of a congressional act and was not valid by executive order. United States v. Ashton, 170 F. 509, 517 (C.C.W.D. Wash. 1909), *appeal dismissed,* Bird v. Ashton, 220 U. S. 604 (1911).

55. The Executive Order of October 16, 1891, extending the reservation "to include a tract of country one mile in width on each side of the Klamath River." 1 KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 815 (A.M.S. ed. 1971).

56. 228 U. S. at 264. The Court evades the more difficult equal footing doctrine question by basing its decision on the United States holding title to the bed, theorizing that title to the bed had been recognized by the state in its statute declaring the river to be non-navigable or that if the river was in fact non-navigable, the United States automatically held title to the bed. *Id.*

Six years later, the Court in *Alaska Pacific Fisheries v. United States*[57] held that Congress had included submerged lands within a reservation established on the Annette Islands in Alaska.[58] Since Alaska was not a state in the Union, there was no confrontation with state jurisdiction under the equal footing doctrine. Rather it was a confrontation between the tribe and an economically powerful private interest, the fishing industry. In holding that the reservation included the submerged lands, the Court stated as follows:

> The reservation was not in the nature of a private grant, but simply a setting apart. . . . of designated public property for a recognized public purpose — that of safeguarding and advancing a dependent Indian people dwelling within the United States. . . .
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> . . . .
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> . . . . The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. . .
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> . . . . The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. . . .[59]

The language of the Act of March 3, 1891, which created the reservation, merely stated that "the body of lands known as Annette Islands . . . is hereby . . . set apart as a reservation for the use of the Metlakahtla Indians."[60] The Court went beyond the reasonable language canon of construction and applied the rule of construction generally applicable to Indian treaties that treaties or statutes with Indians should be liberally construed. Thus in the light of the Indian fishing needs, the words of the Act were construed to grant a disposal of the underlying lands.[61]

Therefore, during this period, the decisions of the Court never squarely faced the issue of state rights under the equal footing doctrine as opposed to tribal rights to the submerged lands.

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57. 248 U.S. 78 (1918). In this suit, the United States sought to enjoin fisheries from maintaining traps in the navigable waters of the Annette Islands of Alaska claiming that the adjacent water and submerged lands were included in the reservation. *Id.* at 86.

58. *Id.* at 89.

59. *Id.* at 88-89.

60. Act of March 3, 1891, ch. 561, §15, 26 Stat. 1101.

61. 248 U. S. at 89.

However, the Court generally laid the groundwork as to what factors were to be considered in determining whether there had been a disposal to the tribe. Economic dependence on the waters and submerged lands was one of these factors. Other considerations were whether there was evidence of congressional intent to establish a sovereign, but dependent nation, and whether the language of the grant lent itself to an interpretation that the grant included the submerged lands by applying the reasonable language or liberal construction rules of interpretation.

B. UNITED STATES V. HOLT STATE BANK

At first glance, these factors, particularly the canons of treaty construction, appear to be tossed aside when the Court in *United States v. Holt State Bank,*[62] holding that there was no disposal of the bed of Mud Lake[63] to the Red Lake Indian Reservation, expanded the rule of *Shively* to require that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."[64]

An examination of the facts in *Holt* discloses, however, that even if more liberal canons of treaty construction were applied, the Court would not have found a disposal of the lake bed in this case. Red Lake Indian Reservation is a unique situation. The tract that became known as the Red Lake Indian Reservation was never ceded by the Chippewas nor set apart by the United States in any formal manner. The reservation was land that was occupied by the Indians and came to be recognized as a reservation by the government and ultimately by the court in *Minnesota v. Hitchcock.*[65] Thus, there was no express grant, either by treaty, statute, or executive order from which a Court could infer that the reservation included the lake bed. In addition, there was no evidence of intent to set apart the land for the purpose of establishing a sovereign nation, but rather evidence of acquiescence to Indian aboriginal title.[66] Although not expressly discussed by the Court, there appeared to be no evidence that Mud Lake and its bed were

62. 270 U. S. 49 (1926).

63. The United States on behalf of the Chippewas sought to quiet title to the bed of Mud Lake because the lake had been drained, uncovering lands which the United States sought to dispose of for the benefit of the tribe. United States v. Holt State Bank, 270 U. S. 49, 52 (1926).

64. *Id.* at 55.

65. 185 U. S. 373 (1902). The case is cited by the Court in *Holt,* and the unique history of the Red Lake Indian Reservation is briefly summarized. 270 U. S. at 58.

66. 270 U. S. at 58.

necessary for the sustenance of the tribe.[67] Thus the factors, which previously had aided the Court in finding title in the Indian tribe were conspicuously absent in this case. There was no evidence of economic dependence on the lands. There was no evidence of congressional intent because there was no specific grant either by treaty, statute, or executive order.

Nevertheless, *Holt* could erect a barrier to Indian tribes acquiring title to lands underlying navigable waters. Since it is the first Supreme Court case which directly involved the clash between state rights under the equal footing doctrine[68] and Indian rights in beds of navigable waters, its requirement that disposals be express or made very plain is significant. The *Holt* requirement is not new. It had been adopted by the courts as a general guideline for construing all grants by the sovereign to private individuals. The rationale was that government lands are held for the public, so that they should not be disposed of to individuals unless the intention is made very clear, inferences to be drawn in favor of the government.[69] It is significant that the *Holt* Court found this canon of construction to be applicable to disposals to Indian tribes. It is unclear why the Court found this application necessary in view of the unusual circumstances of the Red Lake Reservation.

Subsequent cases have recognized, however, that this canon of construction should not be strictly applied to federal disposals to Indians in light of the trust relationship between the United States and Indians.[70]

C. CASES BETWEEN HOLT AND CHOCTAW: 1926-1970

1. Supreme Court Case

The significant Supreme Court case of this period is *Hynes v. Grimes Packing Co.*[71] in which the Court held that the Secretary of Interior was authorized to include tidelands and navigable waters within the Karluk Reservation, but was not authorized to prohibit commercial fishing in the waters of the Karluk Reservation.[72]

67. The Court's description of the lake in its natural condition and the fact that it was drained would seem to indicate that it was not a primary source of food and not very useful for commerce. *Id.* at 56-57.

68. Minnesota was admitted into the Union in 1858. The last treaties with the Chippewas were concluded in 1855. *Id.* at 55, 58.

69. Caldwell v. United States, 250 U. S. 14, 20 (1919).

70. *See generally* 1 AMERICAN INDIAN POLICY REV. COMM'N FINAL REPORT 125-38 (1977) for a good discussion of the federal trust responsibility. This topic will be specifically addressed later in this article. *See* text accompanying notes 120-134 *infra*.

71. 337 U. S. 86 (1949).

72. Hynes v. Grimes Packing Co. 337 U. S. 86, 123. This case was instituted by the canning

Whether the language of the Interior Department regulation designating the reservation was explicit enough to include the adjacent waters and tidelands was not at issue.[73] The question was whether the Secretary of Interior had the authority to include tidelands and navigable waters within the reservation by virtue of a congressional statute[74] which authorized him to designate as a reservation, lands under actual use or occupation or additional "public lands" adjacent thereto. The Supreme Court interpreted the term "public lands" to include tidelands and navigable waters, even though a strict interpretation of that language, as one might read *Holt* to require, could exclude both navigable waters and tidelands.[75] The Court relied on the precedential value of *Alaska Pacific Fisheries*,[76] in particular its finding that the use of the fishing grounds was essential to tribal livelihood.[77] The Court also noted that since the United States retained ultimate title over the lands in this reservation, the interpretation of "public lands" that is applicable when there is a final disposition to an individual was not relevant to this case.[78]

Thus the Court recognized that standards of interpretation must be distinguished depending on whether the grantee is a private individual or an Indian tribe. On the basis of this case it can be argued that *Holt's* requirement of express or plain intent is a standard of interpretation only applicable to private grantees , not Indian tribes, because the United States usually retains ultimate title to reservation lands.

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industry in Alaska to acquire an injunction to prevent enforcement of an Interior Regulation which prohibited commercial fishing in the waters of the reservation except by natives and their licensees. They eventually gained their injunction, not on the grounds that the tidelands and water were not in the reservation, but because the White Act, 44 Stat. 252 specifically prohibited the granting of any exclusive right of fishing. *Id.* at 92, 93, 116-20 (1948).

73. *Id.* at 92. The regulation included within the prohibited area of commercial fishing all waters within 3,000 feet of the shore of the Karluk Reservation. 50 C.F.R. § 208.23 (Supp. 1946). There was no contention that this language did not include the tidelands.

74. White Act § 2, 49 Stat. 1250 (May 1, 1936); 337 U. S. at 91.

75. The district court, applying the strict rule of *Holt,* held that "public lands" did not include tidelands and navigable waters because of the normal meaning of the word, because of cases which stated that public lands does not include tidelands, and because the inclusion violated the White Act. Hynes v. Grimes Packing Co., 67 F.Supp. 43, 48-49 (D. Alaska 1946). The court of appeals modified this somewhat by holding that public lands could include the navigable waters, in light of *Alaska Pacific Fisheries,* but not the tidelands. The court of appeals placed little emphasis on *Holt,* recognizing the rule of liberal construction of treaties and the fishing needs of the Indian community. Like the district court, their primary reason for excluding the tidelands was to prevent giving a monopoly to the Indians. Hynes v. Grimes Packing Co., 165 F.2d 323, 330-31 (9th Cir. 1947). The Supreme Court was able to prevent this monopoly without excluding tidelands and navigable waters from the reservation. 337 U. S. 86 (1948).

76. 248 U. S. 48.

77. 337 U.S. at 114.

78. In the case of Mann v. Tacoma, 153 U.S. 273, 283 (1894), the Court held that a grant from Congress to a private individual of "public lands" did not include tidelands. The rationale was the *Shively* presumption against disposal of tidelands. The *Hynes* Court finds this interpretation of the term "public lands" to be inapplicable to this disposition to an Indian tribe because unlike a grant to the private individual, the disposition is not final. 337 U.S. at 115-16.

2. Lower Court Cases

There are several important lower court cases which again emphasized the fishing needs of the Indian community and found tribal ownership of the submerged lands. In most of these cases, *Holt* was distinguished or disregarded.

In *United States v. Moore,*[79] the Ninth Circuit held that the reservation included the bed of the Quillayute River. The treaty did not specifically include the river, but provided that a reservation should be established sufficient for their needs.[80] The factors considered by the court were the doctrines of tribal sovereignty and the federal government's trust responsibility, the rules of treaty construction, and the importance of fishing to assure their sovereignty. *Holt* was distinguished on the grounds that there was no evidence in that case of the necessity of the waters for an established fishing industry.[81]

A later decision of the Ninth Circuit, however, denied disposal of the tidelands of the Hood Canal to the Skokomish tribe in Washington.[82] While the court recognized the canons of Indian treaty construction, it added that Indian treaties should not be read beyond their clear meaning in order to correct past injustices.[83] The court held that the lower court findings of fact were not clearly erroneous and there was no disposal.[84] The lower court had determined that the treaty and an executive order did not include the tidelands within the exterior boundaries of the reservation[85] and that the evidence failed to establish Indian dependence on the waters. There was substantial evidence showing that the reservation was not intended to support these Indians. Unlike

79. 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U. S. 827 (1947).

80. Treaty with Quillayute Indians of July 1, 1855, 12 Stat. 971.

81. United States v. Moore, 157 F.2d 760, 765 (9th Cir. 1946), *cert. denied*, 330 U. S. 827 (1947). This case is also significant in two other respects. It overturns a prior decision of the Ninth Circuit which had held that there was no disposition of the bed to the Indians because there was an express grant to the state before the establishment of the reservation. Taylor v. United States, 44 F.2d 531 (9th Cir. 1930), *cert. denied*, 283 U. S. 820 (1931). The *Taylor* court, interestingly enough, recognized that the title to the bed involved a confrontation of two political bodies, but that because there was an express grant to the state prior to the reservation, the state possessed title. The *Moore* court rejected *Taylor* as precedent because of an error in its fact-determination. The Enabling Act and the admission of the state into the Union occurred after the creation of the reservation. 157 F.2d at 764. *Moore* is also significant in its determination that allotment is irrelevant to the determination of whether a disposal of the underlying land occurred. *Id.*

82. Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963).

83. *Id.* at 207-8.

84. *Id.* at 210.

85. Neither the treaty nor the executive order described the tidelands in issue. The treaty reserved six sections of land "to be situated at the head of Hood's Canal." Treaty between United States and S'Kallams Indians, January 26, 1855, 12 Stat. 933. The Executive Order of February 25, 1874, described the boundary of the reservation as "Beginning at the mouth of the Skokomish River; thence up said river. . .; thence east to Hood's Canal; then southerly and easterly along said Hood's Canal to the place of beginning." 1 KAPPLER, *supra* note 55, at 924.

many other tribes, these Indians were not confined to the reservation; they were free to roam and hunt.[86]

Two other cases deserve brief mention. A district court in Washington found that tidelands were included in the Lummi Reservation, distinguishing *Holt* on the basis of the fishing needs of the Lummi Indians and language in the treaty specifically extending the reservation to low tidelands on one boundary and specifically including the river on the other.[87]

In *Montana Power Co. v. Rochester,*[88] a grantee from an Indian allottee claimed title to the tidelands so as to be entitled to damages from a dam project. Because of the need to safeguard the tribe as an entity, the court held that allotment, at least to an Indian allottee,[89] did not extinguish tribal title, title being retained by the United States in trust for the tribe.[90] The court summarily held that the Flathead Reservation included the lakebed of Flathead Lake, because the reservation clearly included within its metes and bounds the southern half of the lake, and even if the description were less clear, rules of Indian treaty construction would require the bed to be included.[91]

Thus the cases in the period of 1926-1970 placed little emphasis on *Holt* and reaffirmed the doctrines of tribal sovereignty, the trust relationship, and liberal treaty construction, taking into account the circumstances surrounding the grant.

D. CHOCTAW NATION V. OKLAHOMA

These principles were soundly reaffirmed by the Supreme Court in *Choctaw Nation v. Oklahoma*[92] in which the Court held that treaty grants and patents had conveyed the bed of the navagable Arkansas River to the Cherokee, Choctaw, and Chickasaw Nations where the river was entirely within the boundaries of the grant was well as where the river formed the boundary line between the reservations.[93] The Court reached this conclusion by examining the

86. 32 F.2d at 212. Thus the Court is able to distinguish this case from *Alaska Pacific Fisheries.*

87. United States v. Stotts, 49 F.2d 619 (W.D. Wash. 1930). The court also noted that the tribe retains title to the bed even though some of the adjacent land was allotted to individual members.

88. 127 F.2d 189 (9th Cir. 1942). This decision was recently followed by a district court in United States v. Pollman, 364 F.Supp. 995 (D. Mont. 1973).

89. Montana Power Co. v. Rochester, 127 F.2d 189, 192 (9th Cir. 1942).

90. The Tenth Circuit held that when land adjacent to a non-navigable river bed is allotted to individual members, the tribe loses title to the river bed adjacent to the allotted land. As to the unallotted land, the tribe retains title to the river bed. Choctaw & Chickasaw Nations v. Seay, 235 F.2d 30 (10th Cir.), *cert. denied,* 352 U. S. 917 (1956).

91. 127 F.2d at 190-91, 191 n.4.

92. 397 U. S. 620 (1970).

93. Choctaw Nation v. Oklahoma, 397 U. S. 620, 631 (1970). The Court did not resolve the dispute as to title between the petitioners. *Id.* at 630 n.7.

circumstances and language of the grant[94] and applying the canons of construction that treaties must be interpreted as the Indians understood them with doubtful expressions to be resolved in favor of the weaker party.[95]

The Court found significant a history of removal and broken treaties,[96] promises by the United States of permanent land in fee simple, "never to be embraced in any Territory or State,"[97] and express treaty language describing the boundary as "up the Arkansas," "down the Arkansas" and the "main channel."[98] The fishing needs of the tribe was not determinative.

The Court cited[99] with approval the holding of *Brewer Elliot Oil & Gas Co. v. United States*[100] in which the Court held that the "main channel" language of the treaty granted Osage title to the bed of a nonnavigable portion of the Arkansas. The *Choctaw* Court commented that the "United States can dispose of lands underlying navigable waters just as it can dispose of other public lands."[101]

In reference to the expansion of the *Shively* presumption in *Holt* that "disposals by the United States are not lightly to be inferred and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain,"[102] the Court declared:

> However, nothing in the *Holt State Bank* case or in the policy underlying its rule of construction. . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. Indeed, the Court in *Holt State Bank* itself examined the circumstances in detail and concluded "the reservation was not intended to effect such a disposal." 270 U. S., at 58. . . .[103]

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94. *Id.* at 622-31.
95. *Id.* at 630-31.
96. During the Revolutionary War period, both the Choctaws and Cherokees occupied much of the southern and southeastern portions of the United States. In 1785 and 1786, the United States entered into treaties with both nations to establish boundaries and assure peace and friendship. In the following years there were additional treaties by which the United States purchased land and Indians continued to live on land not ceded. They were not considered to own fee title, but had right to exclusive use and occupancy. After the Louisiana purchase, both nations agreed to trade part of their lands for lands in Arkansas. But because these were already settled by whites, they agreed to cede part of these lands and move further west. *Id.* at 622-26.
97. 397 U.S. at 625 (*quoting* Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830)); *see* 397 U.S. at 626 (*citing* Treaty of New Echota, 7 Stat. 478 (1835)).
98. 397 U. S. at 631.
99. 397 U. S. at 632-33.
100. 260 U. S. 77 (1922).
101. 397 U. S. at 633.
102. United States v. Holt State Bank, 270 U. S. at 55.
103. 397 U. S. at 634.

Sensing a significant erosion of the *Shively-Holt* rule in the majority decision, the dissent reiterated the principles of *Shively* and *Holt* of a strong presumption against disposal[104] and then, applying this principle, argued that there was no disposal. Their reasoning was that the conveyance did not specifically include the upland and navigable waters should remain in the public domain.[105] Furthermore, the dissent stated that there was no evidence of Indian use or desire for the bed during treaty negotiations and that if title did exist it was extinguished by allotment.[106]

On remand an Oklahoma court held that the tribes took title to the middle of the channel because the cessions were in fact to independent political bodies and the normal boundary with regard to state boundaries was the mid-channel of a navigable stream.[107] The Supreme Court, while not resolving the dispute between the tribes, implied this result when it noted that the middle of the main channel is the normal boundary between states.[108] Since identical language was used here as that which normally designates state boundaries, and since "Choctaw and Cherokee Nations. . . had long been considered sovereign entities," the middle of the channel was probably intended, especially in light of the rules of Indian treaty construction.[109] By analogizing tribal government to states, and reaffirming the principles of Indian treaty canon construction, the *Chataw* Court had significantly undercut the doctrine of *Holt,* and to some extent the *Shively* presumption against disposal, when a conveyance to Indian tribes is involved.

E. POST-CHACTAW CASES

Choctaw is the last case in which the Supreme Court has specifically ruled on the issue of the disposal of land underlying navigable waters to Indian tribes. *United States v. Finch*[110] is the most recent case which directly involved tribal ownership of land

104. *Id.* at 645-48.

105. *Id.* at 652-53.

106. *Id.* at 653-54.

107. Choctaw Nation v. Cherokee Nation, 393 F. Supp. 224 (E.D. Okla. 1975). This policy of mid-channel boundaries between states is articulated in Wisconsin v. Michigan, 295 U. S. 455 (1935).

108. 397 U. S. at 631-32, n.8.

109. *Id.* It is significant that the Court quotes an analogy drawn by an early Iowa court and recognized by the Supreme Court in *Barney v. Keokuk,* 94 U. S. 324, 337 (1877):

> The grant to the [Indians] was to them as persons, and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquae* as it is now between Iowa and Illinois.

397 U.S. at 631-32, n.8 (*quoting* Haight v. City of Keokuk, 4 Iowa 199, 213 (1856).

110. 548 F.2d 822 (9TH CIR. 1976), *vacated per curiam,* 433 U.S. 676 (1977).

underlying navigable waters, although a recent Supreme Court decision indirectly dealt with the issue.[111]

Finch involved the issue of whether the bank of the Big Horn was within the boundaries of the Crow Reservation for purposes of establishing jurisdiction for the violation of a tribal ordinance. The district court had held that the bank was not Indian land.[112] On government appeal, the Ninth Circuit held that there was a disposal of the bed, but the Supreme Court vacated the judgment on the grounds that the government appeal was barred by the double jeopardy clause.[113]

In finding a disposal of the bank to the Crows, the Circuit Court utilized the same method of analysis as the *Choctaw* Court, examining the circumstances surrounding the treaties, the language of the treaties, and applying the rules of Indian treaty construction.[114] The *Holt* case is described, but not directly distinguished, except by mentioning that the *Choctaw* Court had found *Holt* to be inapplicable.[115]

The purpose of the treaties, as discussed by the court, was to define the tribal boundaries to help prevent white encroachment and inter-tribal warfare.[116] While the language of the treaties differed from *Choctaw* in that there was no fee simple grant and no explicit clause protecting the tribe from state encroachment, the Crows had the advantage that the Big Horn River was clearly

111. Omaha Indian Tribe, Treaty of 1854 v. Wilson, 575 F.2d 620 (8th Cir. 1978), *vacated* Wilson v. Omaha Indian Tribes, ___ U.S. ___, 47 U.S.L.W. 4748 (U.S. 1979), is an interesting case which involved a dispute over whether the boundary of the reservation remained the same after significant changes in the location of the Missouri River. The boundary depended on whether accretion or avulsion of the river had occurred.

The Eighth Circuit and Supreme Court agreed that the reservation originally included the territory in dispute, as riparian lands granted by treaty, and that the non-Indian carried the burden of proof and persuasion to overcome this presumption of Indian title. However, the courts disagreed as to whether federal or state law determined whether the changes in the river were accretive or evulsive. The Eighth Circuit held that federal law governed because of the federal Indian trust relationship. The Supreme Court reversed, holding that state law was determinative. Its reasoning was that no state border was involved, that no need for a federal uniform law existed and that the equitable application of state law would keep the federal trust responsibility and Indian possessory interests intact.

112. United States v. Finch, 395 F. Supp. 205 (D. Mont. 1975).

113. United States v. Finch, 433 U. S. 676 (1977). In a *per curiam* decision, the Court found a violation of the double jeopardy clause because jeopardy had attached and there had been no formal finding of guilt upon which the appellate court could predicate a conviction. The Court noted that the lower courts had differed as to whether the bed was included in the reservation, but offered no opinion as to the validity of these findings of fact. *Id.* at 677.

114. 548 F.2d 822 (9th Cir. 1976).

115. *Id.* at 828-29.

116. *Id.* at 829. By the Treaty of Fort Laramie of 1851, 11 Stat. 749, 8 tribes including the Crows covenanted to recognize specified boundaries between the tribes. There was no express grant of land from the United States, although the United States did promise to protect the Indian people and was allowed to establish roads and military posts on the reservation. During the negotiation of this treaty, the government used such language as "your land" when dealing with the tribes. 548 F.2d at 830. This language was also used during the negotiation of the Treaty with the Crows of 1868, 15 Stat. 649, in which the national government set apart the lands for the "absolute and undisturbed use and occupation of the Indians." 548 F.2d at 829-31.

situated within the metes and bounds of the reservation, instead of constituting a boundary.[117] As in *Choctaw,* there was no evidence of fishing as an important means of livelihood. But this did not prevent the court from finding a disposal to the Indians. The court recognized that the water was important to the Indians to help reorient their life away from big game and toward such pursuits as agriculture and fishing.[118]

Finch is an important extension of *Choctaw,* because *Choctaw* could be read to be limited to those few tribes which had been granted land in fee simple or which had been assured of protection from state encroachment. The case is also significant because it explicitly rejects the inference that could be drawn from most cases that fishing as the center of Indian livelihood is essential to establish tribal ownership. The important factors after *Finch,* at least in the Ninth Circuit, are whether the treaty can be construed to include the navigable waters within its boundaries and where there is evidence of intent to recognize the tribe as a sovereign body.[119]

IV. CONCLUSION

The forgoing analysis indicates a strong conviction by most courts that tribal ownership to lands underlying navigable waters should be evaluated in terms of long-established Indian law doctrines, rather than the presumption and rules of construction governing private grants from the national government. Although no courts have explicitly stated that the *Shively* presumption and its expansion in *Holt* is not applicable to tribal ownership of submerged lands, many courts have in fact implied this by diluting and counterbalancing the requirement of *Shively* and *Holt* with the doctrines of the federal Indian trust relationship and tribal sovereignty.

A. THE FEDERAL TRUST RELATIONSHIP

The federal trust relationship is a prevasive doctrine which

117. *Id.* at 831.

118. *Id.* at 831-32. The appellee cited several Ninth Circuit cases which had found the fishing needs of the Indians to be a crucial factor. *Id.* at 831 n.16.

119. The Court stated as follows:

> We thus conclude that the United States by signing the treaty of 1868 with the Crows, intended to grant them *dominion* and *control* over that portion of the bed of the Big Horn River situated within the reservation, subject to the retained power of the United States to exercise its paramount right to control navigation in the river.

Id. at 831 (footnote omitted) (emphasis original).

developed early in Indian law[120] which established that the relationship between the United States and Indians is unique because of the special dependent status of Indian nations. There are two components of this doctrine which are useful for purposes of this discussion: the canons of Indian treaty construction and Indian trust title to land.

1. *Indian Treaty Construction*

There are three important canons of Indian treaty construction:[121] 1) Ambiguous expressions in treaties must be resolved in favor of the Indians;[122] 2) treaties must be interpreted as the Indians themselves have foreseen and understood them;[123] and 3) treaties must be liberally construed in favor of the Indians.[124] These rules developed because of a recognition of the brutal and inequitable relations with Indians, along with serious language problems during treaty negotiations.[125] The Court in *Jones v. Meek*[126] summarized as follows:

> In construing any treaty between the United States and an Indian tribe, it must always. . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, matters of a written language, understanding the modes and forms of creating the various technical estates know to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but

120. Cherokee Nation v. Georgia, 30 U. S. (50 Pet.) 1 (1831).
121. These rules apply not only to treaties, but also agreements, executive orders, and statutes. 1 AMERICAN INDIAN POLICY REV. COMM'N FINAL REPORT at 109 (1977).
122. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).
123. Choctaw v. Oklahoma, 397 U. S. at 631.
124. Choctaw Nation v. United States, 318 U. S. 423, 431-32 (1943).
125. 1. AMERICAN INDIAN POLICY REV. COMM'N FINAL REPORT at 109 (1977).
126. 175 U. S. 1 (1899).

> in the sense in which they would naturally be understood by the Indians. . . . [127]

Thus cases involving treaty construction require an analysis of the circumstances surrounding the grant.

The vast majority of cases in the area of tribal ownership of navigable beds have recognized and applied these canons of construction, the notable exception being *Holt*. However, as the Court in *Choctaw* recognized, even *Holt* surreptiously applied these principles by noting the circumstances surrounding the establishment of the reservation.[128] And in fact, had the *Holt* Court applied these canons of construction, there still was no evidence of any intent to dispose of these lands to the Red Lake Indian Reservation. If it can be assumed that the courts will continue to apply these rules of construction,[129] it can safely be surmised that *Holt's* requirement of an express or plain intention is not applicable to tribal ownership. However, merely applying these canons of construction does not overcome the general presumption against disposal expressed in *Shively*.[130]

2. *Indian Trust Title to Land*

Except when Indian tribes have been granted land in fee simple or individual Indians have gained title through the process of allotment, a tribe merely holds beneficial title to its land. Legal title is vested in the United States as trustee for the benefit of the tribe. As the Court in *Hynes v. Grimes Packing*[131] indicated, the implication of this doctrine is that the rules regarding grants from the sovereign should not be applicable, since the sovereign still retains ultimate control over the land. The federal government can at any time revoke the grant of the navigable lands or can by statute or regulation assure that the public right in the bed is protected. As the reader will recall, the main rationale for the presumption of *Shively* was to assure that the public right in the navigable waters

127. Jones v. Meek, 175 U. S. 1, 10-11 (1899) (citations omitted).

128. 397 U. S. at 634.

129. Even though the Supreme Court in its recent decisions continues to refer to the canons of Indian treaty construction, an argument can be made that the Supreme Court is no longer, in fact, applying these canons to the cases before them. One could point to the cases of DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) in which the Court found that the reservations, respectively, had been terminated and disminished, although there was no express congressional language to that effect. The Court in *DeCoteau* noted that while treaties are to be construed in favor of the Indians, "[a] canon of construction is not a license to disregard clear expressions of tribal and Congressional intent." 420 U.S. at 447

130. Shively v. Bowlby, 152 U. S. at 1.

131. 337 U. S. 86 (1949).

and submerged lands is protected and that the bed is not distributed piecemeal to individuals.[132] Even if the reservation land is allotted, the Indian allottee does not gain private title to the bed of the navigable water; the title is retained by the United States in trust for the tribe.[133] It is also interesting to note that if the submerged land has passed to the state, the state subject to the public trust doctrine, has the right to convey the bed as it chooses, including the power to grant it to private individuals.[134]

Thus, even if the tribe can be described as a private individual, a disposal to the tribe is not clearly different than a disposal to the state. In both cases the land may ultimately be occupied by private individuals, but the interest of the community is still protected, at least to a limited extent. However, the tribe is more than an individual. It is a sovereign political body.

B. TRIBAL SOVEREIGNTY[135]

The doctrine of tribal sovereignty developed very early in the history of the United States in the decision of *Worcester v. Georgia,*[136] in which Chief Justice Marshall stated that Indian tribes are "distinct, independent, political communities."[137] However, a year before, this statement was limited by the doctrine that Indian tribes are always subject to the power of the federal government.[138]

Being both independent of the state and dependent on the federal government, the tribe is faced with the paradox of having less sovereignty than a state because the federal government has complete control over the tribal government,[139] but at the same time being protected in most cases from the intrusion of state jurisdiction, while also being a part of the state geographically.

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132. 152 U. S. at 49, 50.

133. Montana Power Co. v. Rochester, 127 F.2d 189, 192 (9th Cir. 1942).

134. Illinois Cent. R. R. v. Illinois, 146 U. S. 387, 435-37, 465, 474 (1892).

135. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-50 (Univ. N. Mex. ed. 1971); Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 70's, 54* NOTRE DAME L. REV. 5 (1978).

136. 31 U. S. (6 Pet.) 515 (1832). This case involved an attempt by Georgia to abolish the Cherokee government. The Supreme Court held that Georgia's laws could not operate against the Cherokee tribe.

137. Worcester v. Georgia, 31 U. S. (6 Pet.) 350, 379 (1832).

138. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), Justice Marshall called the Cherokees a "domestic dependent nation." *Id.* at 12.

139. The United States can establish federal criminal jurisdiction on the reservation. United States v. Kagama, 118 U. S. 375 (1886); the United States can also unilaterally abrogate treaties. Lone Wolf v. Hitchcock, 187 U. S. 553 (1903).

This paradox is the source of many of the disputes in Indian law,[140] particularly the disputes between the tribe and the state.[141]

The dispute over title to lands underlying navigable waters is essentially a reflection of this power struggle between the state and the tribal government for jurisdiction over land. If the navigable water is clearly within the boundaries of the reservation, it seems natural that the tribe should hold title to the bed, since it has jurisdiction over waters located within the reservation.[142] The more difficult question arises when the navigable waters constitute a boundary of the reservation, *i.e.*, whether the title goes to the opposite shore so as to include the entire bed, whether it goes to mid-channel as state boundaries normally do, whether it goes to the low water mark, as grants to private individuals do.

The state's argument is that the *Shively* presumption should be applied, that title generally only goes to the low water mark, because the tribe, like an individual, does not protect the public interest in the navigable waters or its underlying land. The tribe merely protects its own interest.[143] On the other hand, while tribal sovereignty over navigable water and lands is not public because non-Indians may be excluded, its control is public in the sense of being governed for the benefit of the tribe as opposed to the benefit of an individual party. It is important to remember that the *Shively* presumption arose in the context of a dispute between individuals, the purpose of the presumption being to prevent a piecemeal disposal to individuals.[144] A tribe cannot dispose of the bed piecemeal and will in fact govern it to assure that the tribal interest is protected, especially since ultimate federal control is always present.[145]

The *Choctaw* case in its analogy of the water boundaries of tribes and states[146] additionally lends support to this position that a grant to a tribe should at least be treated as a grant to a state, as long as there has been some recognition of the sovereignty of the tribe. Thus, if the grant indicates the navigable water as a boundary, the grant should at least go to mid-channel and possibly

140. *E.g.*, Talton v. Mayes, 163 U. S. 376 (1896) (whether the fifth amendment is applicable to tribal governments and courts); United States v. Wheeler, 435 U. S. 313 (1978) (whether a tribal conviction could give rise to double jeopardy).

141. *E.g.*, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1959).

142. *See generally* United States v. Finch, 548 F. 2d 822, 831 (1976).

143. Choctaw Nation v. Oklahoma, 397 U. S. 620, 652-53 (1970) (White, J., dissenting).

144. *See supra* text accompanying notes 34-36.

145. *See supra* text accompanying note 78.

146. *See supra* text accompanying and note 109.

further if the circumstances and language of the grant indicate special tribal needs for the entire bed.

Thus, since the tribe is a sovereign body, the presumption of *Shively* should not be applicable at all. Courts should recognize the sovereign nature of the tribe and construe the grant in light of the trust relationship. The language of the grant should be interpreted to convey at least as much underlying land to Indians as when a state is the grantee. The Indian need for land and water resources to insure tribal sovereignty and self-sufficiency should also be taken into consideration when defining reservation boundaries. Finally, the obligation of the federal government to act as trustee and guardian for Indian tribes should give rise to a presumption of Indian title to underlying lands, which can only be overcome by express or plain intent to the contrary.

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