

1982

Indian Law - Ownership of Lands Underlying Navigable Waters and Limits to Tribal Sovereignty - Montana v. United States

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Recommended Citation

Vance, Ann Gifford (1982) "Indian Law - Ownership of Lands Underlying Navigable Waters and Limits to Tribal Sovereignty - Montana v. United States," *Land & Water Law Review*. Vol. 17 : Iss. 1 , pp. 189 - 205. Available at: https://scholarship.law.uwyo.edu/land_water/vol17/iss1/8

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INDIAN LAW—Ownership of Lands Underlying Navigable Waters and Limits to Tribal Sovereignty. *Montana v. United States*, 450 U.S. _____, 101 S. Ct. 1245 (1981).

The Crow Indian Reservation occupies more than two million acres of land in the State of Montana.¹ The Big Horn River flows through the middle of the reservation. The river provides an excellent habitat for trout and duck and is therefore a popular hunting and fishing ground.

In 1973, the Crow Tribal Council passed a resolution barring anyone not a member of the Crow Tribe from hunting and fishing on the reservation. The Tribe's primary concern was to limit hunting and fishing on the Big Horn River. The Tribal Council stated that the purpose of its action was to insure the continued availability of game as a food source for the Crow.²

The State of Montana did not accept the Tribe's assertion of authority to regulate hunting and fishing by non-Indians within the reservation. Therefore, Montana continued to announce the opening and closing of hunting seasons on all reservation lands. The State also continued to issue licenses to non-tribal members to hunt and fish within the reservation.³

In an attempt to resolve the conflict between Montana and the Crow Tribe, the United States, in its own right and as fiduciary for the Tribe, initiated this suit in the Federal District Court for the District of Montana.⁴ The United States requested:

- (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Crow Tribe;
- (2) a declaratory judgment establishing that all authority to regulate hunting and fishing within the reservation belongs to the Crow Indians and the United States; and
- (3) an injunction preventing Montana from issuing hunting and fishing licenses for use within the reservation without the Tribe's permission.⁵

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1. The Crow Indian Reservation was established by the Second Treaty of Fort Laramie in 1868. Several Acts of Congress have reduced it from its original size of 8 million acres to slightly less than 2.3 million acres. *Montana v. United States*, _____ U.S. _____, 101 S. Ct. 1245, 1249 (1981).
2. Brief for Respondent United States at 5, *Montana v. United States*, *supra* note 1.
3. *United States v. Montana*, 604 F.2d 1162, 1165 (1979).
4. *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978).
5. *Montana v. United States*, *supra* note 1, at 1250.

The District Court found for the State of Montana on all counts.⁶ The Court of Appeals for the Ninth Circuit reversed the District Court's decision.⁷ The appellate court decided that the United States held title to the bed of the Big Horn River for the Crow Tribe. The court also found that the Tribe could prohibit non-members from hunting and fishing within the reservation, unless the non-members were resident fee-owners of reservation lands. Further, the court held that the Crow could regulate hunting and fishing on the reservation by non-members, subject to the limitation that the Tribe could not impose criminal sanctions on non-Indians. Finally, the court found that the State of Montana had the power to regulate hunting and fishing by non-tribal members within the reservation.⁸

The United States Supreme Court granted certiorari to review the Court of Appeals' decision. In an opinion written by Justice Stewart, the Court reversed the lower court's judgment and remanded the case for further proceedings.⁹ The Court found that the State of Montana held title to the bed of the Big Horn River.¹⁰ The Court further found that the Crow Tribe possessed no authority to regulate or prohibit hunting and fishing on reservation lands owned in fee by non-members of the Tribe.¹¹ Justice Blackmun, joined by Justices Brennan and Marshall, dissented from that part of the Court's opinion pertaining to ownership of the riverbed.¹² Justice Stevens wrote a concurring opinion.¹³

HISTORICAL BACKGROUND

A. *The Treaties*

The Crow Indians migrated from Canada to the region they now occupy approximately three centuries ago. Following the discovery of gold in California in the 1840's, the number of white emigrants travelling through the Crow's land increased greatly. The travellers destroyed great quantities of buffalo and other game, timber and grass in their journey westward.

6. *Id.* (citing *United States v. Montana*, *supra* note 4).

7. *Id.* (citing *United States v. Montana*, *supra* note 3).

8. *United States v. Montana*, *supra* note 3, at 1165-66.

9. *Montana v. United States*, *supra* note 1, at 1259.

10. *Id.* at 1254.

11. *Id.*

12. *Id.* at 1259.

13. *Id.* at 1265.

The Indians were angered by the damage to the sources of their sustenance, and from time to time expressed their wrath through violence.¹⁴

In an effort to secure safe passage for its citizens, the United States in 1851 entered into a treaty with the Crow and several other Indian tribes. The agreement is known as the First Treaty of Fort Laramie.¹⁵ The treaty provided that the United States would protect the Indians against depredations by its citizens. The Indians on their part agreed to acknowledge distinct territories as their own, to make restitution for wrongs committed against United States citizens, and to keep peace among themselves.¹⁶

Although the Crow fulfilled their obligations under this agreement, the United States failed in its duty to protect the Tribe from depredations by whites.¹⁷ Ever-increasing numbers of white men passed through or settled within Crow territory. In another attempt to resolve the conflicting demands by the whites for land to settle and by the Indians for protection of their source of livelihood, the United States negotiated another agreement with the Crow. This treaty, called the Second Treaty of Fort Laramie, was signed in 1868.¹⁸

The 1868 treaty promised that a portion of the territory occupied by the Crow under the 1851 treaty would be set apart as a reservation for their exclusive and undisturbed use. The treaty also promised that no non-Indian, except agents of the government, should "ever be permitted to pass over, settle upon, or reside in" the Crow's land.¹⁹ The Crow in return relinquished all claims they had to any land outside the borders of their reservation.²⁰

B. *The Allotment Acts*

The General Allotment Act of 1887²¹ marked the firm establishment of a new trend in federal Indian policy. Up until

14. *Crow Nation v. United States*, 81 Ct. Cl. 238, 242 (1935).

15. Treaty of Fort Laramie, September 17, 1851, reprinted in KAPPLER, 2 INDIAN AFFAIRS: LAWS AND TREATIES 594 (1904) [hereinafter cited in text as 1851 treaty].

16. *Id.*

17. *Crow Nation v. United States*, *supra* note 14, at 247.

18. Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 [hereinafter cited in text as 1868 treaty].

19. *Montana v. United States*, *supra* note 1, at 1254-55 (quoting Treaty with the Crow Indians, *supra* note 18).

20. Treaty with the Crow Indians, *supra* note 18.

21. The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-358 (1976)).

the 1870's Congress had followed a policy of separation in its dealings with the Indians, which was reflected by the establishment of reservations. Then, after the Civil War, the sentiment began to grow among members of Congress and the public, that Indians deserved the benefits of white civilization.²² Allotment was the means by which Congress intended to break up tribal culture and clear the way for Indians to become civilized.²³

The General Allotment Act provided for the apportionment of reservation lands among individual members of the Tribe.²⁴ After a specified period of time the land could be alienated to non-Indians.²⁵ When the process of allotment was complete, allottees and Indians who left the tribe and took up civilized life would become United States citizens, subject to federal and state law.²⁶ Special acts, of which the Crow Allotment Act was one, were passed to facilitate the process among individual tribes.²⁷

The process, however, was never completed. For many reasons, allotment failed to prove itself a benefit to Indians.²⁸ In 1934, the policy of allotment was discontinued under the Indian Reorganization Act.²⁹ This Act did not repeal the General

22. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207-09 (1945) (citing *History of the Allotment Policy: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, at 428-89 (1934) (statement of D. S. Otis). Cohen quoted from the Otis statement extensively throughout Chapter 11 of his handbook. According to Cohen, this article provided the primary factual basis for termination of the allotment system. COHEN, *supra* at 206.

23. *Id.* at 208.

24. The General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388.

25. Each allottee was to receive a patent for his land which would be held in trust by the United States for a period of 25 years. Barring extensions of the trust period, the allottee would then own the patent in fee, free from restrictions on alienation. *Id.* § 5.

26. *Id.* § 6. In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976), the State of Montana attempted to justify its taxation of Indians living on allotted reservation lands by arguing the continuing vitality of this section of the General Allotment Act. The Supreme Court rejected the State's argument. The Court noted that while the General Allotment Act had never been repealed formally, the Indian Reorganization Act of 1934 repudiated the concept of tribal dissolution on which the Allotment Act had been based. Consequently, the Court found, Section 6 could possess no current significance.

27. The Crow Allotment Act of 1920, ch. 224, 41 Stat. 751.

28. D. S. Otis noted, among possible reasons for the allotment system's failure:

- (1) that it emphasized agriculture, though much of the Indian's land was not suitable for farming,
- (2) that the Government failed to give adequate aid to the allottees, and
- (3) that allowing the Indians to lease the land did not encourage them to develop into self-sufficient farmers.

Whatever the reasons, the end result of the policy was that most Indians did not develop into self-supporting citizens but moved steadily towards total poverty. COHEN, *supra* note 22, at 211-16 (citing *History of the Allotment Policy*).

29. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 461-479 (1976)).

Allotment Act but prohibited further allotment of reservation lands.³⁰ Provisions of the Reorganization Act extended the existing trust periods on allotted lands indefinitely,³¹ and generally prohibited alienation of restricted Indian lands.³² Further provisions acted to strengthen tribal government.³³ The total effect was to reinstitute traditional Indian forms of government and property ownership.³⁴

Unfortunately, reorganization of the tribes took place after non-Indians became fee owners of land within the reservations.³⁵ Thus, while the reservations were returned to a policy of tribal ownership and control, they were no longer the exclusive preserves of Indians.³⁶ The resulting confusion between individual property rights and tribal rights traditionally guaranteed by treaty was the source for several of the issues addressed by the Supreme Court in *Montana v. United States*.

THE QUESTION OF OWNERSHIP

The first question the Supreme Court addressed in *Montana* involved interpretation of the United States' 1868 Treaty with the Crow Tribe. The question was whether under the terms of the treaty, the United States had reserved the bed of the Big Horn River from the conveyance it made to the Crow.³⁷ A question existed because the Big Horn River is a navigable waterway, subject to particular legal doctrines.³⁸

In English common law, the land under all navigable waters belongs to the sovereign.³⁹ After the American Revolution, the various states received title to those lands as part of

30. 25 U.S.C. § 461 (1976).

31. 25 U.S.C. § 462 (1976).

32. 25 U.S.C. § 464 (1976).

33. 25 U.S.C. §§ 476-477 (1976).

34. The reinstatement of traditional tribal ways was a voluntary choice for the Indians. The Act provided that tribes could vote against its application to their reservations. 25 U.S.C. § 478 (1976).

35. The Reorganization Act did not attempt to alter the title possessed by Indians who owned unrestricted patents in fee or non-Indians who purchased from them. See note 25 *supra*.

36. The present ownership of the Crow reservation breaks down as follows:

52%	Allotted to members of the Crow Tribe
17%	Tribally owned
28%	Owned by non-members
2%	Owned by the State of Montana
1%	Owned by United States

Montana v. United States, *supra* note 1, at 1249.

37. *Montana v. United States*, *supra* note 1, at 1250.

38. *Id.* at 1251.

39. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

their sovereign powers.⁴⁰ Thereafter, in order that each new state should be admitted to the Union on an "equal footing" with the rest, the federal government generally reserved land underlying navigable waters from conveyances of territorial property.⁴¹

Nevertheless, Congress does have the power to convey such lands, and defeat the title of a future state in order to carry out certain public purposes.⁴² The establishment of an Indian reservation can be an appropriate purpose under this rule.⁴³ However, some special exigency must exist before the Court will find that a conveyance has taken place.⁴⁴ Consequently, courts which decide the question of title to lands under navigable waters must begin with a presumption against conveyance⁴⁵ and not infer one unless the intention to convey was declared or made plain.⁴⁶

Prior to its decision in *Montana*, the Supreme Court had addressed the question whether lands under navigable waters were included in a grant of reservation lands in only three cases.⁴⁷ Two of those cases hold particular importance for the present discussion.⁴⁸ One, *United States v. Holt State Bank*,⁴⁹ is important because the Court relied on it so heavily in deciding *Montana*. The other case, *Choctaw Nation v. Oklahoma*,⁵⁰ is important because its relevant facts so closely resemble those in *Montana*. Further, *Choctaw* is important because until the Court's decision in *Montana*, *Choctaw* appeared to represent the trend of the Court's decisions in this area on the issue of riverbed ownership.⁵¹ These two cases, therefore, merit special examination at this point.

40. *Id.*

41. *Montana v. United States*, *supra* note 1, at 1251 (citing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-23 (1845)).

42. *Id.* at 1251 (quoting *Shively v. Bowlby*, *supra* note 9, at 48).

43. *Id.* at 1253.

44. *Id.* at 1251 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

45. *Id.* (citing *United States v. Oregon*, 295 U.S. 1, 14 (1934)).

46. *Id.* (quoting *United States v. Holt State Bank*, *supra* note 44).

47. The three cases are: *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. Holt State Bank*, *supra* note 44; and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

48. The third case, *Alaska Pacific Fisheries v. United States*, *supra* note 47, is not as important to the present discussion because it played no part in the Court's decision and because its factual situation is very different from the one in the present case.

49. See note 44 *supra*.

50. See note 47 *supra*.

51. See Note, *Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction Under the Equal Footing Doctrine vs. Tribal Sovereignty*, 55 N. DAKOTA L. REV. 453-74 (1979).

The Supreme Court ruled on *Holt* in 1926. At issue was title to the bed of Mud Lake, located on what had been the Red Lake Indian Reservation of Minnesota. The Supreme Court found there was nothing in the manner of the creation of Red Lake Reservation to indicate an intent to convey the lake bed. In its decision, the Court noted there had been no formal setting apart of land for the reservation, or declaration of the Indian's rights, or attempted exclusion of outsiders from the navigable waters. Rather, through a series of treaties the land had been set apart in a general way for the use of the Indians and thus had come to be recognized as a reservation.⁵² Consequently, the Court concluded that the lake bed belonged to the state.⁵³

The Court's decision in *Choctaw* settled a dispute between several Indian tribes and the State of Oklahoma over title to the bed of the Arkansas River. The Indians claimed title from treaties that established their reservation. These treaties granted designated lands to the Indians in fee simple for as long as they should exist as nations and live on the land. In addition, the treaties provided that the Indians' land would never be a part of a state, nor would any state have the right to pass laws for their nation.⁵⁴

The Court found that the treaty description of the Indians' lands, specifying only exterior boundaries, clearly included all lands within the boundaries, and therefore included the riverbed.⁵⁵ More important to the Court, however, than the particular language of the grant, were the long-recognized rules of Indian treaty construction. Those rules as stated by the *Choctaw* Court, were:

- (1) that treaties must be interpreted as the Indians would have understood them, and
- (2) that doubtful expressions in treaties should be construed in the Indian's favor.⁵⁶

The circumstances of the grant and the application of the rules for construing Indian treaties were enough, in the Court's

52. *United States v. Holt State Bank*, *supra* note 44, at 58 (citing *Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902)).

53. *Id.* at 59.

54. *Choctaw Nation v. Oklahoma*, *supra* note 47, at 625.

55. *Id.* at 628.

56. *Id.* at 631.

view, to overcome the presumption against conveyance of lands under navigable waters. Therefore the Court found that the U.S. held title to the riverbed in trust for the tribes.⁵⁷

Mr. Justice Stewart, writing for five members of the Court, began the majority opinion's analysis of *Montana* with an examination of the Court's decision in *Holt*. He stated that the Crow treaties, like the treaties examined in *Holt*, failed to overcome the presumption against conveyance of the beds of navigable waters. The majority found no express conveyance of the riverbed, nor any clear intentions to convey it. Instead, they found that the effect of the Crow treaties was identical to that of the Chippewa treaties in *Holt*: to reserve in a general way what remained of the Indians' territory.⁵⁸

In making its comparison between *Holt* and *Montana*, the Court failed to note a critical distinction between the two cases. In *Holt*, the Court's statement of the treaties' effects followed directly from the Court's recognition that there was no treaty expressly setting apart a reservation for the Indians concerned, nor any affirmative declaration of the Indians' rights in their land.⁵⁹ The opposite, however, was true in *Montana*. The 1868 treaty contains both a formal setting apart of land not ceded by the Indians and an affirmative declaration of the Indians' rights to the exclusive use of that land. The resemblance between the effects of the treaties in *Holt* and *Montana* is thus slight.

The *Montana* Court further stated that the grant to the Crows of the exclusive right to occupy the lands within the reservation's borders, did not support the inference that the riverbed was included in those lands. All parties conceded that the United States retains a navigational easement in all navigable waters for the benefit of the public. Therefore, regardless of who owned the riverbed, that easement would prevent the Crow from restricting travel on the river. Consequently, the Court found that one could not infer an intent to grant all the land within the reservation's borders from a grant of exclusive use of those lands.⁶⁰ The Court apparently reason-

57. *Id.* at 635.

58. *Montana v. United States*, *supra* note 1, at 1252.

59. *See United States v. Holt State Bank*, *supra* note 44, at 58.

60. *Montana v. United States*, *supra* note 1, at 1252-53.

ed that if exclusivity could be a diluted concept, then the actual grant of lands could be diluted, too.

The Court's construction of the treaty grant of specific lands is totally contrary to the construction the Court gave to a similar grant in *Choctaw*. The Court noted there that the treaty described the land reserved to the Indians by delineating only external boundaries. The *Choctaw* Court interpreted this description as clearly encompassing all the lands within the described boundaries, including the bed of the Arkansas.⁶¹

The *Montana* majority failed to explain the difference in its construction of treaty language. Possibly one may imply an explanation from its discussion of *Choctaw*. The majority's entire treatment of the most recent precedent to its decision was relegated to footnote 5 of the majority opinion.⁶²

In that footnote, the majority sought to distinguish *Choctaw* on its facts. The majority found significant the fact that the Choctaw were relocated to the land they now occupy.⁶³ The Court majority did not explain, however, why these historical origins should give the Choctaw a better claim to lands underlying navigable waters than the Crow, whose lands were part of the territory they had occupied prior to the arrival of white men.⁶⁴

The *Montana* majority also found crucial to the Court's resolution of *Choctaw*, the fact that the Indians in that case received a grant in fee simple to their lands, as well as a promise of freedom from state jurisdiction.⁶⁵ As the dissent in *Montana* noted, however, a careful reading of *Choctaw* fails to yield the same conclusions.⁶⁶ The treaty provisions in *Choctaw* which provided that the Indians' lands would never be included in any state, were important to the *Choctaw* Court only to the extent that they helped to construe the United States' intent.⁶⁷

61. *Choctaw Nation v. Oklahoma*, *supra* note 47, at 628.

62. *Montana v. United States*, *supra* note 1, at 1253 n.5.

63. *Id.*

64. Justice Blackmun commented that "if anything . . . the Crow Indians would have had an even greater expectancy . . . that the rivers encompassed by their reservation would continue to belong to them." *Id.* at 1261 n.9 (dissenting opinion).

65. *Id.* at 1253 n.5.

66. *Montana v. United States*, *supra* note 1, at 1262 n.11 (dissenting opinion).

67. See *Choctaw Nation v. Oklahoma*, *supra* note 47, at 635.

The grant in fee was not a grant of fee simple absolute, but was conditioned on the Indians remaining a nation and continuing to occupy the land.⁶⁸ The critical distinction between the rights conveyed by a conditional fee simple grant and the rights possessed by the Crow Indians under the 1868 treaty, is not readily apparent. The Court does not offer to explain the difference it sees.

Whether or not the title granted in *Choctaw* was significantly different from the title the Crows received through the 1868 treaty, the Court in *Choctaw* gave no indication that the fee grant was important to its decision. The *Choctaw* Court's entire discussion centered on the construction of treaty terms that described the lands to be reserved. The crucial factor in the Court's analysis of those terms was not the nature of the grant by which the lands were transferred, but the application to the terms of the rules requiring Indian treaties to be construed as the Indians would have understood them.

The majority opinion in *Montana* failed to acknowledge that the Court in *Choctaw* even considered special principles of construction for Indian treaties, much less that the *Choctaw* Court found them extremely important to its decision. In fact, the majority in *Montana* never acknowledged that such principles exist, though the Court had previously applied them in case after case involving Indian treaties.⁶⁹ The District Court in *Montana*, even though it eventually found for the State, set out in detail the principles of Indian treaty construction as "the presumptions upon which Indian cases are based."⁷⁰

Possibly, the *Montana* majority failed to acknowledge the principles because the Court in *Holt*, the case relied on most heavily in *Montana*, did not acknowledge them. The *Holt* Court, however, did not construe the terms of any treaty since it noted that none specifically set apart land for the Indians or made an affirmative declaration of these rights. Since the Indians in *Holt* received no grant of exclusive possession or assurance that their land would never be used for anything

68. *Id.* at 625.

69. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Alaska Pacific Fisheries v. United States*, *supra* note 47.

70. *United States v. Montana*, *supra* note 4, at 607.

else,⁷¹ the *Holt* court did not have to determine the significance of these rights. In *Holt*, therefore, the Court focused on the circumstances of the grant to the Indians rather than particular terms.

The Court in *Montana*, on the other hand, was faced with specific treaty terms to construe. The possible justification for the Court's failure to acknowledge established rules of construction in *Holt* is not available to the majority in *Montana*. The Court offered no explanation for the omission, so one cannot know if the Court will neglect to apply the rules in future Indian treaty cases. If the rules retain their vitality, then the Court's decision in *Montana* may have little precedential value.

That the Court declined to follow *Choctaw*, a 1970 case with a decidedly similar factual underpinning, in favor of *Holt*, a 1926 case arising under substantially different circumstances, is disturbing. Even more disturbing is the Court's summary disposal of *Choctaw* by distinguishing it on its facts in a footnote. The most disquieting aspect of this portion of the Court's decision, however, is the Court's failure to acknowledge, much less employ, the hitherto firmly established principles governing treaty construction. What this forebodes for the resolution of future treaty construction cases is difficult to tell. At the least, one may note that the Court entered a field where the governing legal principles were well-established, disrupted the long-established chain of precedent, and departed without one word of explanation for its action.

THE QUESTION OF TRIBAL AUTHORITY

Following its resolution of the riverbed ownership question, the Court turned to examine the extent of the Tribe's authority to regulate hunting and fishing by non-Indians on reservation land owned in fee by non-members of the Tribe. The appellate court found that the Crow treaties, and the Tribe's inherent sovereignty, gave the Crow the authority to regulate hunting and fishing on all parts of their reservation.⁷² The Supreme Court did not agree with the lower court's conclusions.⁷³

71. *Id.* at 606.

72. *Montana v. United States*, *supra* note 1, at 1254.

73. *Id.*

The Court noted that the 1868 treaty may well have given the Tribe authority to control hunting and fishing within the bounds of the reservation. The Court found, however, that this authority was limited to land on which the Crow still retained their right to exclusive use and occupancy.⁷⁴ The Court said that "it defied common sense" to think Congress intended that the purchasers of allotments would become subject to tribal jurisdiction, when one purpose of the Allotment Acts was the eventual dissolution of tribal government.⁷⁵ The case of *Puyallup Tribe v. Washington Game Department*, the Court said, supported the principle that treaty rights in reservation lands may be affected by the subsequent alienation of those lands.⁷⁶ The Court did not offer any other authority for its characterization of the status of non-Indian landholders within the reservation. If authority is to be found for the Court's remarks, it must come from cases the Court discussed in examining the nature of Indian sovereignty.

The Court began its examination of Indian sovereignty by noting its discussion of the concept in *United States v. Wheeler*.⁷⁷ In *Wheeler* the Court found that although Indian tribes possessed attributes of sovereignty, they had lost many of those attributes through their incorporation into the United States, and through treaties and statutes. The Court in *Wheeler* decided that the Indians' loss of sovereignty had occurred in the area of relations between Indian tribes and non-members of the tribes, because sovereignty in this area was inconsistent with the tribes' dependent status.⁷⁸

The *Montana* Court added to the above-cited principles the statement that any exercise of tribal power beyond that which is necessary to regulate internal affairs or protect tribal self-government "cannot survive without express Congressional delegation."⁷⁹ The *Montana* Court cited a line of cases as sup-

74. *Id.* at 1255.

75. *Id.* at 1255 n.9.

76. *Id.* at 1256. In that case, the Court found that the Indians' exclusive right to fish had been diluted by the alienation of reservation land to non-members. *Puyallup Tribe v. Washington Game Dep't.*, 433 U.S. 165, 174 (1977). *Puyallup* may be distinguished from *Montana* however on the basis that so much of the reservation was owned by non-Indians there was a question as to whether it still existed. *Id.* at 173 n.11.

77. 435 U.S. 313 (1978).

78. *Montana v. United States*, *supra* note 1, at 1257 (quoting *United States v. Wheeler*, *supra* note 77).

79. *Montana v. United States*, *supra* note 1, at 1257.

port for its conclusion regarding tribal power.⁸⁰ The principle embodied in these cases is commonly called the test of *Williams v. Lee*.⁸¹

The test provides that state laws may apply on reservations, but only when they do not conflict with a federal statute and only when they do not interfere with a tribe's right to self-government.⁸² The *Montana* Court's statement that a tribe's exercise of sovereign authority beyond certain limits is invalid absent express Congressional authorization, seriously distorts the *Williams v. Lee* test. Under the *Montana* Court's analysis, a rule previously used to determine the limits of state authority over Indian reservations, becomes instead a test for the valid exercise of tribal authority.

The *Montana* Court employed its reformulation of *Williams v. Lee* to decide that regulation by the Crow Tribe of hunting and fishing on lands no longer tribally owned was an unauthorized exercise of tribal power. The Court found that such regulation was not clearly related to tribal self-government or the tribe's internal affairs.⁸³ The Court cited *Olyphant v. Suquamish Indian Tribe* in support of its position.⁸⁴ Although *Olyphant* expressly applied only to a tribe's jurisdiction over criminal activities, the Court said that the case stood for the general proposition that an Indian tribe's inherent sovereign powers do not extend to non-tribal members' activities.⁸⁵

The Court then noted several instances in which Indian tribes do retain some sovereign power over the activities of non-Indians. The Court expressly stated that Indians retain sovereignty in these circumstances even when the activities the Tribe desires to regulate take place on reservation lands owned by non-Indians.⁸⁶ According to the *Montana* Court, permissible exercises of tribal sovereignty over the activities of non-Indians include:

80. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Williams v. Lee*, 358 U.S. 217 (1959); and *United States v. Kagama*, 118 U.S. 375 (1885)).

81. *Williams v. Lee*, *supra* note 80.

82. *Id.* at 220.

83. *Montana v. United States*, *supra* note 1, at 1257-58.

84. *Olyphant v. Suquamish Indian Tribe*, *supra* note 69.

85. *Montana v. United States*, *supra* note 1, at 1258.

86. *Id.*

- (1) regulation by licensing, taxing or other means, of consensual relationships between the Tribe or its members and nonmembers; and
- (2) regulation of conduct that threatens or directly affects the political integrity, economic security, health or welfare of the Tribe.⁸⁷

The Court found that nothing in this case brought the activities in question within the scope of legitimate exercise of tribal authority. The Court stated that hunters and fishermen on non-Indian owned lands within the reservation do not enter into any consensual relationships with the tribe. The Court stated further that no harm to the Crow's welfare was alleged by the complaint in the District Court. Finally, the Court found no threat to the Tribe's political integrity in the non-Indians' activities.⁸⁸ The Court noted that the State's regulation did not infringe on the Tribe's right to regulate hunting and fishing on lands still held in trust for or owned by the Tribe and its members. Furthermore, the Court found that the Tribe traditionally acquiesced in the State's regulation of non-members.⁸⁹

While the *Montana* Court's analysis emphasized the limits on tribal sovereignty, the Court nevertheless admitted that Indian tribes retain some sovereign powers. Though the Court apparently imposed new limits on those powers through its reformulation of the test in *Williams v. Lee*, and through its extension of the rule in *Oliphant*, it cited broad exceptions to the strictures of its rules.

The Court found that the facts in *Montana* did not bring the case under one of the exceptions allowing exercise of Indian sovereignty over non-Indians. However, similar regulations by other Indian tribes would not necessarily be invalidated through this analysis. The Court's decision in *Montana* appears to depend at least in part on the Crow Tribe's failure to show that it was harmed by the non-members' activities. A showing that non-members' activities within the reservation adversely affected tribal rights appears to open those activities to tribal regulation. From the Court's

^{87.} *Id.*

^{88.} *Id.* at 1258-59.

^{89.} *Id.* at 1259 (citing *United States v. Montana*, *supra* note 4, at 609-10).

statements, this holds true whether or not the activities take place on land owned by non-members. The question in future cases decided under the *Montana* analysis will be whether the degree of impact is sufficient to validate tribal regulation.

The *Montana* court, through its analysis of Indian sovereign powers, both supported and limited its "common sense" declaration of the rights of non-Indian fee owners of reservation lands.⁹⁰ The limits on tribal power to regulate activities taking place on reservation lands owned by non-Indians do not derive simply from the fact that the lands were alienated to non-Indians. Neither does the fact that the lands were alienated to non-Indians exempt those landowners from all tribal regulation.

Whether or not Congress intended purchasers of allotted lands to take them free from Indian control,⁹¹ the Indian Reorganization Act and subsequent federal statutes and Supreme Court cases confirm that Indian tribes have never lost all their attributes of sovereignty. The Supreme Court, in *United States v. Mazurie*, stated that Indian tribes possess a measure of sovereignty over their territory as well as their members.⁹² The "territory" the Court referred to in that statement clearly embraced reservation lands owned by non-Indians.⁹³ The *Mazurie* Court's statement was cited with approval in *United States v. Wheeler*,⁹⁴ and again in the Court's opinion in this case, *Montana v. United States*.⁹⁵

The Court's decision in *Montana* did not negate that statement. The Court did define the limits of the Indians' retained sovereignty more narrowly than it had in previous cases. One might conclude that the Court decreed the end to Indian sovereignty over fee lands with its common sense statement of purchasers' expectations and Congress' intentions regarding allotted lands.⁹⁶ However, the Court made clear in its later analysis of Indian sovereignty that this was not its intent.

90. See text accompanying note 75 *supra*.

91. See *Montana v. United States*, *supra* note 1, at 1255 n.9.

92. 419 U.S. 544, 557 (1975).

93. *Id.* The question in the case concerned tribal authority to regulate activities on land owned by non-Indians.

94. *United States v. Wheeler*, *supra* note 77, at 323.

95. *Montana v. United States*, *supra* note 1, at 1257.

96. *Id.* at 1255, n.9.

The Court was faced with a difficult problem in *Montana v. United States*. Probably the Court is correct when it states that non-Indians could not have expected to be submitting themselves to tribal jurisdiction when they purchased allotments. Nevertheless, the policies behind allotment have since been repudiated.⁹⁷ The Indian Reorganization Act reaffirmed the partial sovereignty retained by Indian Tribes. Indians' expectations as to their rights to exercise the sovereign powers they retain within the physical limits of their jurisdiction, deserve as much consideration as non-Indians' expectations concerning the control of their property. Some accommodation must be reached between the rights of the opposing parties in this situation.

The Court's decision in *Montana v. United States* is an attempt at an accommodation. The answer it provides to the problems raised may be limited to the facts of this case. Nevertheless, the Court's decision indicates that accommodations, rather than total destruction of rights, are its goal. The question the Court's decision raises is to what extent fee-holder's exercise of traditional property rights will be allowed to infringe on Indian treaty rights in their reservations.

CONCLUSION

Both issues presented in *Montana v. United States* pitted Indian rights against the interests of non-Indian Americans. The Supreme Court resolved the question of ownership of the bed of the Big Horn River by looking to presumptions in favor of state ownership and ignoring presumptions that might lead to a finding of Indian ownership. The Court dealt with the issue of Indian power to control activities within the reservation by narrowly construing the scope of tribal authority over the activities of non-Indians.

The conflicts giving rise to this case result from the clash between the values and expectations possessed by two different cultures. The history of interaction between Indian tribes and American society is fraught with such conflicts. Although the Supreme Court attempted in part to balance the

⁹⁷. *Id.*

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expectations of the opposing parties, its decision served to reinforce an old pattern: when the expectations of white men and Indians differ, it is most often the Indians' expectations that give way.

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