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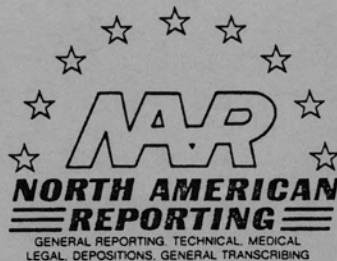
Supreme Court of the United States

MONTANA, ET AL.,)
Petitioners,)
v.) No. 79-1128
UNITED STATES, ET AL.)

Washington, D.C.
December 3, 1980

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ORIGINAL



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IN THE SUPREME COURT OF THE UNITED STATES

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v. :
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No. 79-1128

Washington, D.C.

Wednesday, December 3, 1980

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
10:04 o'clock a.m.

APPEARANCES:

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THOMAS J. LYNAUGH, ESQ., 303 North Broadway, Billings,
Montana 59101; on behalf of the Crow Tribe of Indians
as Respondent.

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E R A S E
P R O C E E D I N G S
C O N T E N T

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 first this morning in Montana et al. v. United States.

4 Mr. Roth, you may proceed whenever you're ready.

5 ORAL ARGUMENT OF URBAN L. ROTH, ESQ.,

6 ON BEHALF OF THE PETITIONERS

7 MR. ROTH: Mr. Chief Justice, and may it please the
8 Court:

9 The Crow Indian Reservation created by the treaty of
10 1868 is an area of approximately 2.2 million acres located in
11 the State of Montana. About 400,000 acres of that land is in
12 tribal hands and is located in the Pryor Mountains of the
13 Big Horn Mountains, and there are no issues involved in this
14 case affecting that particular land. Approximately 30 percent
15 of the Reservation lands are owned by non-Indians, approxi-
16 mately 43 percent of the population of the Reservation is
17 non-Indian. The Big Horn River is a navigable river that
18 rises in the State of Wyoming and flows for many miles before
19 it reaches the State of Montana. It is a navigable stream and
20 within the heart of the Reservation flows for approximately
21 45 to 50 miles.

22 In the Big Horn Mountains area, the Yellowtail Dam,
23 a federally funded project, has been built, which backs up a
24 reservoir of approximately 70 miles, which extends into the
25 State of Wyoming. The building of that dam created an

1 excellent cold water fishery. However --

2 QUESTION: Is the dam inside the Reservation?

3 MR. ROTH: Yes, it is, Your Honor. The cold water
4 fishery that was created by the dam is a put-and-take stream.
5 That is, the river itself does not lend itself to spawning.
6 As a result, the State of Montana has been, since the dam was
7 built, the only contributor up to the time of trial of the
8 fish which proliferate in that particular stream. Brown and
9 rainbow trout are the main species. They are exotic to the
10 Reservation, are not indigenous, and were introduced into the
11 Reservation by the State of Montana.

12 The Tribe owns only one 40-acre tract which is
13 riparian to the river. All other riparian land has either
14 been allotted or is owned by non-fee owners. Montana owns a
15 number of parcels riparian to the river which they use for
16 fishing and boating access.

17 QUESTION: Now, you say, Montana owns it, which they
18 use?

19 MR. ROTH: Yes, Mr. Chief Justice.

20 QUESTION: Who uses it, the people of Montana?

21 MR. ROTH: The State of Montana in a sort of a
22 parens patriae position owns the --

23 QUESTION: Montana owns it in fee?

24 MR. ROTH: Yes, it does.

25 QUESTION: And who uses it?

1 MR. ROTH: Fishermen, various non-Indians or
2 Indians, whoever wants to use that particular piece of proper-
3 ty to gain access to the Big Horn River or fish the waters of
4 the Big Horn River.

5 QUESTION: By license, by permission, or is it just
6 open?

7 MR. ROTH: Well, with regard to nonmembers, of course
8 the State of Montana has consistently required a state hunting
9 or fishing license.

10 QUESTION: Nonmembers of what?

11 MR. ROTH: Nonmembers of the Crow Indian Tribe.
12 Excuse me.

13 QUESTION: But not any particular permission to go
14 on the property, is that it?

15 MR. ROTH: No. There isn't any permission required
16 by the State of Montana to go on the pond. It's open to the
17 public.

18 QUESTION: And that's been true up until this liti-
19 gation, anyway?

20 MR. ROTH: Yes. That's correct. In this lawsuit
21 brought by the United States and joined in by the Crow Tribe
22 of Indians, the United States claims that the Big Horn River,
23 this navigable river, is owned by them in fee for the benefi-
24 cial ownership of the Crow Indian Tribe. They also claim in
25 this Court that save and except for the exception carved out

1 for the nonmember of the Crow tribe, owner of fee lands,
2 hunting and fishing exception, which is carved out by the
3 lower court, that the Crow Tribe has the exclusive right to
4 regulate hunting and fishing within the Reservation, including
5 that engaged in by nonmembers on fee-owned lands within the
6 Reservation.

7 The State of Montana in its amici states -- refutes
8 these contentions.

9 Trial of this case was before the Hon. James F.
10 Battin, District Judge for the District of Montana. In that
11 trial Judge Battin heard the testimony of 15 witnesses,
12 examined 288 exhibits, studied the pretrial discovery, and
13 thereafter rejected the claims of the respondents. In making
14 his conclusion he relied upon many of the facts that were
15 developed through testimonial evidence and through the exhib-
16 its themselves. Many of these factual findings, we believe,
17 are critical to resolution of the issues before this Court
18 today.

19 Upon appeal to the lower court, the lower court re-
20 versed in part and affirmed in part. They carved out a pecu-
21 liar exception for the non-Indian fishing and hunting on his
22 fee lands. They held that that was authorized but still the
23 Tribe could regulate that activity so long as that regulation
24 was nondiscriminatory.

25 However, with regard to the non-Indian neighbors

1 such as Mr. Lackland, who testified at trial, who owns 1,040
2 acres within the confines of the Reservation in fee and who
3 lives approximately 30 miles off the Reservation, and who
4 built a pond and stocked it with fish -- oddly, that
5 particular individual cannot under the lower court's ruling go
6 onto that land and fish that stock.

7 QUESTION: Why? Because he's a nonresident, is that
8 it, of the Reservation?

9 MR. ROTH: Because he's a nonresident and a nonmember
10 of the tribe. But what's the irony of that situation is
11 this, that that nonmember, as conceded by the respondents,
12 can post his land. And although the exclusive hunting and
13 fishing right is claimed by the Tribe, nevertheless he can
14 exclude the member from hunting and fishing on his land.

15 The State of Montana petitioned this Court, and
16 it was granted certiorari to review the conclusions of the
17 lower court. Additionally, I would like to comment upon the
18 fact that although there was no comment about the facts found
19 by District Judge Battin, nevertheless, apparently on those
20 same factual findings the lower court reached a conflicting
21 conclusion.

22 Basically, there are two sets of issues in this
23 case, which we will separate into what we call the ownership
24 or river issues, and the regulatory issues. However, both
25 sets of issues require that a study of the treaty history and

1 the legislative history entered into between the United States
2 and the Tribe be undertaken.

3 The first treaty with the Crow and the United States
4 occurred in 1825. Basically, it was a treaty of friendship.
5 It established the paramount authority of the United States,
6 and that authority was extended to resolve disputes that might
7 occur between the Indians and the non-Indians. This treaty
8 was followed by the treaty of 1851. As the lower court ob-
9 served, there was no express grant of land contained in the
10 1851 treaty, although a particular territory was allo-
11 cated to the Crow Indian Tribe. The only reference to hunting
12 and fishing in that particular treaty was a reference that all
13 of the tribes retained their privilege to hunt and fish on
14 basically, I suppose, their traditional hunting and fishing
15 grounds. This was followed by the Treaty of 1868.

16 Again, in Article I of that treaty, the United States
17 was a sovereignty; paramount sovereignty was again recognized,
18 and it was the only sovereign in that treaty who could sanction
19 non-Indian intruders or malfeasors, if you will. There was
20 no jurisdiction or sovereignty which was given or granted to
21 the tribes by that treaty. And I think that's very, very --

22 QUESTION: Of course, the very existence of a treaty
23 implied the sovereignty of the Indian nation, didn't it? You
24 don't make a treaty with somebody who's not a sovereign.

25 MR. ROTH: Well, that's correct. The United States,

1 however, was -- many times, of course, treaties are entered
2 into with equal sovereignty, such as to --

3 QUESTION: Between us and England, say?

4 MR. ROTH: Between us and England. In this case the
5 paramount sovereignty of the United States was conceded by
6 the tribe.

7 QUESTION: But you don't make a treaty with somebody
8 who doesn't have some sovereign qualities?

9 MR. ROTH: Yes.

10 QUESTION: In other words -- otherwise, you just pass
11 a law.

12 MR. ROTH: That's correct. Well, as a matter of
13 fact, though, although the quasi-sovereignty of the Indian
14 tribes was recognized at that time, there was no question that
15 the United States could pass a law if they wanted to, and do
16 whatever they wished with regard to the Indians. Nevertheless,
17 out of deference to their particular status, I'm sure that they
18 did treat with them.

19 QUESTION: Mr. Roth?

20 MR. ROTH: Yes, Mr. Justice?

21 QUESTION: In the United States v. Finch case, in the
22 report in Fed. Sup. are a number of maps. And as you're
23 going through these treaties, I take it that you accept the
24 correctness of those maps?

25 MR. ROTH: Yes, I do, Mr. Justice. I omitted to say

1 that in the -- well, I haven't got to the granting, or the
2 reservation clause of the Treaty of 1868. In regard to that
3 Article 2, there was reserved approximately an area of 8 mil-
4 lion acres for the absolute and undisturbed occupation of the
5 Crow Indian Tribes. In addition, no one was permitted to re-
6 side or go upon the Reservation without consent. By Article 4
7 of that Treaty the Crow Tribe of Indians agreed to make it
8 their permanent home. However, they were given the privilege
9 -- and I put quotes around the word privilege because that
10 word had its counterpart within the Crow Tribe. In other
11 words, they had a fairly sophisticated vocabulary. They knew
12 what privilege as opposed to right meant, and that was a
13 privilege to hunt and fish on the unoccupied lands of the
14 United States so long as peace persisted between the United
15 States and the Crow Tribe.

16 Superimposed upon those treaties is a legislative
17 history which includes the allotment policy, or the assimila-
18 tion policy, commencing with the General Allotment Act of
19 1887 --

20 QUESTION: Before you get to that, Mr. Roth, are you
21 going to touch at some point in your oral argument on the
22 Equal Footing doctrine of Pollard v. Hagan?

23 MR. ROTH: Yes, sir. The allotment policy was
24 applied to the Crow Indian Reservation by the Allotment Act
25 of 1920. Against this treaty and legislative backdrop is the

1 Equal Footing Doctrine upon which the State of Montana makes
2 its claims to the ownership of the bed and banks of the Big
3 Horn River. It's important to note that that doctrine was
4 enunciated 26 years prior to -- or at least the foundations of
5 that doctrine were enunciated some 26 years prior to the Treaty
6 of 1868 in the case of Martin v. Waddell, which was decided
7 in 1842. It was followed shortly thereafter by the case of
8 Pollard's Lessee v. Hagan, in 1845.

9 I think it's also important to fasten upon why the
10 Equal Footing Doctrine apparently came into existence. In
11 Martin v. Waddell, in studying the underpinnings of that par-
12 ticular doctrine, this Court apparently seized upon the fact
13 that by the Revolutionary War the 13 original colonies gained
14 their independence, and thus their sovereignty, from the King
15 of England. By virtue of that sovereignty they then became
16 substitute for the King of England to own all of the navigable
17 waters which were in or touched upon those 13 original colo-
18 nies.

19 In Pollard's Lessee v. Hagan this doctrine was then
20 expanded to those states who were not within the 13 original
21 colonies. And in that first case, really articulating the
22 Equal Footing Doctrine, I think it's important to note that
23 they said that title, by virtue of the Constitution, was not
24 vested in the United States, it was vested in the tribe, and
25 by virtue of the Constitution, then, in territorial days the

1 fee title to those navigable waters was held by the United
2 States in trust for the future states that would be carved out
3 of those territories. That's significant because in 1868,
4 with regard to the Territory of Montana, that territory had
5 already been established. As a matter of fact, a number
6 of territory acts had conceded title -- Nebraska,
7 Dakota, Washington, Idaho, and subsequently, of course,
8 Montana.

9 By 1868 territorial capitals had been created.
10 By 1868 counties which included the territorial limits of the
11 Crow Reservation had been created. And I think, at this
12 point, that it is significant to refer the Court to Section 2,
13 because it becomes important as we talk about the relevancy
14 of Choctaw Nation v. Oklahoma. Section 2 of the Organic Act,
15 or Section 1 of the Organic Act establishing the Territory of
16 Montana --

17 QUESTION: And where is this, Mr. Roth?

18 MR. ROTH: It appears at pages 30-31 in Vol. II of
19 the Joint Appendix.

20 And it states, "That nothing in this act contained
21 shall be construed to impair the rights of persons or property
22 now pertaining to the Indians in said territory so long as
23 such rights remain unextinguished by treaty between the United
24 States and such Indians, or to include any territory" -- now,
25 here is the important part: "...which, by treaty with any

1 Indian tribes, is not, without the consent of said tribe, to
2 be included within the territorial limits or jurisdiction of
3 any state or territory."

4 Now, what's significant about that? That is signifi-
5 cant because in the Treaty of 1868 the drafters of that
6 treaty did not provide, as they did in the treaties of New
7 Echota with the Choctaw, and the later treaty of 1835 with
8 the Cherokee, a provision guaranteeing that the land or terri-
9 tory would never be contained in any subsequent state or
10 territory. Thus, I think that language in the territorial
11 act is significant because they never intended that those
12 later created Indian reservations would not be contained within
13 a subsequent state or territory. In 1868 --

14 QUESTION: Mr. Roth?

15 MR. ROTH: Yes, Justice Blackmun.

16 QUESTION: In these treaties, however, with the
17 Indians, do you think that the Crow understood the meaning of
18 the Equal Footing Doctrine?

19 MR. ROTH: No, I don't think they did, Your Honor.

20 QUESTION: Well, isn't the understanding of the
21 respective parties to the treaties rather important, then?

22 MR. ROTH: Well, I believe so. I also don't believe
23 that they understood what the ownership of the bed and banks
24 of the navigable river actually entailed, nor did they possess
25 the sovereignty that I think is necessary for the regulation,

1 control, and ownership of a segment of a large, navigable
2 stream, was within their understanding.

3 QUESTION: What is the value of a treaty or any
4 engagement if we're going to probe into the understanding?

5 MR. ROTH: I beg your pardon?

6 QUESTION: What is the value of a treaty or a con-
7 tract if we're going to undertake to probe into whether the
8 parties understood the contents?

9 MR. ROTH: Well, at times this Court appears to have
10 indicated that it is relevant as to what the understanding of
11 the parties was in the circumstances.

12 QUESTION: Special Rule as to Indian Treaties?

13 MR. ROTH: Yes, that's correct. And particularly
14 the circumstances surrounding those treaties. However, that
15 cuts both ways, I think. As this Court observed, I
16 believe, in *Rosebud v. Kneip*, the surrounding circumstances,
17 i.e., the legislation, the case law that existed at that par-
18 ticular time, was also important in ascertaining what the
19 intent of the United States was with regard to the particular
20 territory. In *Rosebud v. Kneip* and *DeCoteau*, this Court
21 assumed that Congress was cognizant, for example, of *Lonewolf*
22 *v. Hitchcock*, which provided the basis for abrogation of
23 Indian treaties; and that they were cognizant of certain other
24 factors. I think, in regards to the Treaty of 1868, we must
25 assume that Congress was cognizant of the Equal Footing

1 Doctrine and the strong constitutional presumption against
 2 separating the ownership of a navigable river from a sovereign
 3 state. In 1868, also, I think it's significant that the
 4 Crow were a buffalo-centered culture. They were not dependent
 5 upon fish, again, a factor that this Court and the lower
 6 court has deemed significant in ascertaining whether or not
 7 navigable waters were contained within confines of a reserva-
 8 tion. I cite to you Alaska Pacific Fisheries v. Alaska, and
 9 the lower court cases of Skokomish Tribe v. France, United
 10 States v. Moore, and United States v. Stotts.

11 In Skokomish, of course, because of the absence of
 12 an interest or dependence upon fish, the lower court held
 13 that it would not imply that navigable waters were contained
 14 within the confines of the reservation. Also, it's important
 15 that the lower court, in its factual findings, found that the
 16 Crow Tribe was not dependent upon the Big Horn River for tra-
 17 vel. Also, that -- it's important, I think, that most of, if
 18 not all of the tribal interests in the river are preserved
 19 without actual proprietorship being conveyed.

20 For example, the Winters Doctrine reserves to them
 21 water. The U.S. v. Powers reserves to them irrigation rights.
 22 Confederated Salish & Kootenai Tribes v. Namen guarantees them
 23 access and use of the water. And of course, the fact that
 24 they are riparian to the river guarantees that they will have
 25 access to the fishing or whatever waterfowl or upland game

1 birds are found along its shores or on its waters.

2 QUESTION: That's a matter of state law, isn't it?
3 Any riparian owner has those rights?

4 MR. ROTH: That's correct; that's correct.

5 QUESTION: Mr. Roth?

6 MR. ROTH: Yes, Mr. Justice White?

7 QUESTION: Do you think the claim here that's been
8 sustained in favor of the Tribe indicates that they own not
9 only the bed of the river but the water in the stream, in the
10 sense that they could control, if they wanted to, the navi-
11 gability of the stream?

12 MR. ROTH: I won't concede that point. I will
13 concede that they will claim it.

14 QUESTION: Do you think the judgment below would
15 enable the tribe not only to regulate fishing in the river but
16 the navigation of it ?

17 MR. ROTH: I would concede that they will assert
18 that right, Your Honor.

19 QUESTION: Well, how do you read the holding below?

20 MR. ROTH: I read the holding below as conveying to
21 them ownership of the entire stream.

22 QUESTION: Of the entire stream?

23 MR. ROTH: Yes, presumably regulatory power.

24 QUESTION: Because, after all, there is no necessary
25 connection between ownership of the bed of the stream and

1 control of navigation.

2 MR. ROTH: Absolutely not. They've conceded the
3 navigational servitude.

4 QUESTION: Furthermore, there's no necessary connec-
5 tion between ownership of the bed of the stream and the ability
6 to fish in the water.

7 MR. ROTH: Well, other than the statement in
8 Shively v. Bowlby that the navigational servitude includes the
9 right to travel, the right of commerce, and also the right of
10 public fishing.

11 QUESTION: Well, but, as you well know, in the
12 western states there is certainly a major controversy between
13 those who claim they own the bed of the river and people who
14 want to float the river.

15 MR. ROTH: Absolutely, Your Honor.

16 QUESTION: And I suppose that the holding below would
17 indicate the Tribe could keep people from floating the river
18 fishing?

19 MR. ROTH: Yes. Actually, with regard to that
20 argument --

21 QUESTION: As long as they didn't get on the banks
22 or the bottom of the stream?

23 MR. ROTH: Yes. Basically, they've conceded that
24 the river ownership isn't exclusive.

25 QUESTION: There's a rule in some states, you know.

1 MR. ROTH: They can float the river but they can't
2 cast their line into the water and catch a fish planted by the
3 State of Montana, is basically a part of that issue.

4 QUESTION: Well, the holding below would say the
5 Tribe could prevent floaters on the river?

6 MR. ROTH: Not floaters on the river, no.

7 QUESTION: Why? Why?

8 MR. ROTH: Because --

9 QUESTION: They can control navigation, you told me.

10 MR. ROTH: No, I didn't. I said they could -- per-
11 haps I misperceived your question.

12 QUESTION: No, under the holding below, they could.

13 MR. ROTH: No, I don't think the holding below went
14 that far. I don't think the issue of whether or not the
15 navigational servitude survives.

16 QUESTION: Do you think the court below then said,
17 well, the treaty gave the bottom of the river, but it didn't
18 give the river? The treaty did not give the Tribe control of
19 the river? Is that what the holding was?

20 MR. ROTH: I think that the lower court actually
21 didn't deal with the navigational servitude. Obviously, I
22 think, because of the concession by the respondents that a
23 navigational servitude --

24 QUESTION: I'm not talking about a servitude. I'm
25 talking about whether the tribe had the authority to control

1 navigation on the river.

2 MR. ROTH: No, I don't think the lower court went
3 that far.

4 QUESTION: Well, if it didn't, why would the treaty
5 give the Indians the bottom of the river but not the power to
6 control navigation? And if it didn't give the power to con-
7 trol navigation, why would it give them the bed of the river?

8 MR. ROTH: Precisely. The United States -- or the
9 respondents have conceded that Confederated Salish and Kootenai
10 Tribes v. Naman controlled access, waterfree, to naviga-
11 tional rights on the Big Horn River. And that poses, basical-
12 ly, a paradoxical question. Why would the United States in
13 pursuing some public exigency or public purpose grant to the
14 Crow Tribe the bottom or bed of the river and then superimpose
15 upon that a navigational servitude which would not permit them
16 to control navigation?

17 QUESTION: Well, the question is the effect of the
18 treaty in that respect.

19 MR. ROTH: Yes.

20 QUESTION: The boundaries of the Reservation in-
21 cluded the Big Horn River.

22 MR. ROTH: It did include the Big Horn River.

23 QUESTION: And the argument is that therefore they
24 had the bottom of the river. Well, why didn't they have the
25 power to control navigation? under that same treaty?

1 MR. ROTH: I don't know why the respondents -- but
2 they have -- conceded that issue to us. And they have in
3 answers to interrogatories.

4 QUESTION: I'm not sure I understand. You seem to
5 link, you seem to say that they can grant the right to float
6 on the water.

7 MR. ROTH: By "they," Your Honor, is the Tribe? Or
8 the State of Montana?

9 QUESTION: But you link that with the ground below.
10 Now, you might grant, logically, the right to float on the
11 stream, but retain title to the land in case there is oil or
12 gold or something else under it. Nothing inconsistent about
13 that, is there?

14 MR. ROTH: No, you could do that, but I think
15 you'd have to do it with definite language. You certainly
16 wouldn't imply that.

17 QUESTION: I thought you -- I got the impression
18 that you were saying just that, that they could not separate
19 these two?

20 MR. ROTH: Well, I think they would not separate
21 the two because, in the first instance, there isn't any treaty
22 language that would even approach that kind of an intent.
23 And to do that, I believe, basically would be inconsistent
24 because there was certainly nothing in 1868 which would make
25 the bottom or bed of the stream particularly valuable to the

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Tribe nor that they placed any particular value upon the bed of the stream. Thus, to separate --

QUESTION: Well, the question in the case is -- one of the questions in the case is fishing in the river.

MR. ROTH: That's correct.

QUESTION: It isn't taking things off the bottom of the river and if they don't have control over navigation in the river and the use of the water in the river, what is the authority to prevent fishing in the river?

MR. ROTH: Your Honor, that is our argument. Where is the authority? I reiterate that in answers to interrogatories the respondents have conceded that Confederated Salish and Kootenai Tribes v. Namen, which I referred to as Namen I because Namen II is on its course up through the appellate court, an early decision by the Honorable William J. Jameson, which held that on the Flathead Lake in Montana, within the Flathead Indian Reservation, riparian owners did have, pursuant to the navigational servitude, the right of access and wharfage without tribal permission to the navigable waters of Flathead Lake.

In response to interrogatories in this case, the respondents have conceded that that case is authoritative in this case and that, indeed, all riparian owners have those rights, which the Honorable William J. Jameson articulated in Namen I.

E Z E R A S E
C O N T E N T

1 QUESTION: Well, how can one reconcile that conces-
2 sion in Namen with the holding of the 9th Circuit in this case
3 that the State of Montana does not own the bed of the river in
4 question?

5 MR. ROTH: I don't think one can, because I do be-
6 lieve it creates a paradox. And I think the amicus brief in
7 support of the petition by the State of Washington focuses
8 upon that particular dilemma.

9 QUESTION: Well, where is the Flathead case now?

10 MR. ROTH: It's in the 9th Circuit, however not --

11 QUESTION: Well, what do you think is going to
12 happen to Judge Jameson there?

13 MR. ROTH: Well, first of all, Namen I upon which I
14 rely has already been to this Court on a petition for certio-
15 rari by the Flathead Tribe and certiorari was denied. The
16 9th Circuit affirmed Namen I's decision on those rights.

17 QUESTION: So that case is settled? I mean, that
18 case is --

19 MR. ROTH: That case is settled and the Tribe --

20 QUESTION: -- in the 9th Circuit?

21 MR. ROTH: That's right. And the Tribes in Namen II
22 which is on its way up, have not challenged Namen I's decision
23 on that point.

24 QUESTION: Well, apparently the 9th Circuit doesn't
25 think there's anything inconsistent between the Flathead

1 case and the Big Horn case?

2 MR. ROTH: Apparently. I would also like to rapidly
3 focus upon certain other factors which I believe bear upon the
4 ownership issue, and that is the fact that rather boilerplate
5 language was used in the treaty. It wasn't the unique treaty
6 language studied by the Court in Choctaw Nation v. Oklahoma.
7 It affects a host of other treaties. It affects all of the
8 navigable waters, basically, of the western states, at least
9 with regard to a cohesive and coherent regulatory policy.

10 It's important that prior to 1973 Montana was the only juris-
11 diction to plant fish in the Big Horn River. It's important
12 to note that Montana was the only jurisdiction that controlled
13 hunting and fishing by nonmembers on the Big Horn or fee lands
14 prior to 1973. It's important to note that nonmembers have
15 fished and hunted the Big Horn without hindrance since the
16 turn of the century, and the public agencies in promoting
17 Yellowtail Dam listed as one of the side benefits the creation
18 of a good cold water fishery below Yellowtail Dam.

19 We submit that under the Equal Footing Doctrine, as
20 applied to an Indian reservation, in the United States v.
21 Holt State Bank, and certainly not departed from in Choctaw
22 Nation v. Oklahoma, but under the peculiar facts of that case
23 warrant a departure from that, that the Equal Footing Doctrine
24 applied in this case guarantees the State of Montana ownership
25 of the bed and banks of the Big Horn River within the Crow

1 Indian Reservation.

2 I would like to turn briefly to the regulatory issues
3 because that is another portion of this case, and it's impor-
4 tant that in the treaties there was no exclusive hunting and
5 fishing rights given to the Tribe. The argument apparently
6 of the respondents -- that their right to regulate nonmember
7 hunting and fishing within the Reservation has two sources:
8 one, proprietorship --

9 QUESTION: Mr. Roth, before you leave the ownership
10 issue permanently, is it your view that immediately before
11 Montana became a state the title to the river was in the
12 United States as trustee for the Indians or --

13 MR. ROTH: As trustee for the State.

14 QUESTION: As trustee for the State to be formed?
15 That's what it was? All right.

16 MR. ROTH: Yes. And perhaps, in further answer to
17 that question, there was in effect that obligation on the
18 United States to hold that fee title for the State was consti-
19 tutional in origin, as I believe this Court stated in Corvallis
20 Sand & Gravel Company v. Oregon.

21 QUESTION: Mr. Roth, could you tell me just a little
22 bit about the Big Horn? How large a stream is it?

23 MR. ROTH: Well, it contributes, at the confluence
24 of the Yellowstone and the Big Horn River, almost three billion
25 acre feet per year to the Yellowstone River.

1 QUESTION: So how much -- what's the cubic foot/
2 second flow, do you know?

3 MR. ROTH: I don't know what the cubic foot/second
4 flow is.

5 QUESTION: Well, but you fish it, you wade it to
6 fish, a lot of times? At some places?

7 MR. ROTH: Sometimes you wade, but basically it
8 lends itself to floating, because there is a large quantity of
9 water which is released at minimum flow levels from the
10 Yellowtail Dam.

11 QUESTION: From the Yellowtail Dam, and so fishing
12 below that is -- so it comes out as a steady temperature, is
13 it?

14 MR. ROTH: Yes. That's one of the -- as a matter of
15 fact, you've hit upon one of the features that make it such an
16 excellent fishery, because it comes out --

17 QUESTION: It comes out the bottom of the dam, so
18 it's cold water?

19 MR. ROTH: Yes. Forty-five degrees to 50 degrees.

20 QUESTION: And it's relatively steady flow?

21 MR. ROTH: Yes, Your Honor.

22 QUESTION: But you can wade the edges at various
23 places?

24 MR. ROTH: That's correct.

25 QUESTION: And a lot of people fish it that way,

1 I suppose?

2 MR. ROTH: No question about it.

3 QUESTION: And a lot of people would like to stop
4 in quiet water and get out of their boats and fish?

5 MR. ROTH: Yes.

6 QUESTION: And it depends -- and who owns the bottom
7 would determine whether you can do that?

8 MR. ROTH: That's correct.

9 QUESTION: Mr. Roth, again, just to finish up this
10 thought, because I want to be sure I have your position. It's
11 your view that this trustee relationship between the United
12 States and the future State to be formed was of constitutional
13 origin and it was formed before 1868. Does that mean that if
14 the Treaty of 1868 had in explicit language said, we hereby
15 convey to you the bed of the river, something like that, that
16 that would have been beyond the power of the United States?

17 MR. ROTH: I don't think one can ignore this Court's
18 language in *Shively v. Bowlby* and in *Choctaw Nation v. Okla-*
19 *homa*, despite the very, very strong language that this Court
20 later used in *Corvallis Sand & Gravel Company v. United States*.
21 However, very, very stringent limitations were placed upon
22 a departure from the Equal Footing Doctrine. And yes, I
23 would concede that in light of the *Choctaw* case and in light
24 of *Shively v. Bowlby*, they would have that power, if they did
25 it explicitly, and for a sufficiently strong public purpose

1 with clear and definite language.

2 QUESTION: Well, wouldn't that have raised some con-
3 stitutional implications under the Equal Footing Doctrine,
4 which is a part of the Constitution --

5 MR. ROTH: Yes, there is a constitutional question
6 raised there, and I think one would then perhaps, going to
7 Shively v. Bowlby, and assuming that Shively v. Bowlby did
8 indeed put strict parameters around departure of the policy --
9 i.e., a public exigency or international duty called for a dec-
10 laration of intent -- then I suppose one could inquire into
11 whether or not Congress in approving the treaty or the legis-
12 lation was acting within those constitutional parameters es-
13 tablished in Shively v. Bowlby.

14 QUESTION: Well, there's some tension here, isn't
15 there, between the Equal Footing Doctrine and the Choctaw case?

16 MR. ROTH: I believe there is. I believe there is,
17 Your Honor.

18 I would like to touch briefly upon the regulatory
19 issue and would say this, that if this Court's decision re-
20 cently in Colt with regard to the taxing authority of the
21 Tribes is indeed a test, which I perceive that it is, and that
22 that test basically has three prongs.

23 Number one, that Indian authority or sovereignty over
24 a nonmember steps at tribal land. Secondly, that a legitimate
25 tribal interest must be perceived in the regulation.

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1 And thirdly, that there is no overriding federal policy which
2 conflicts with the regulation. If I perceive that as the
3 present test of nonmember exercise of sovereignty, or tribal
4 exercise of sovereignty over nonmembers, then Resolution
5 74-05 doesn't satisfy any of that three-prong test.

6 Number one, obviously they exert their sovereignty
7 over the nonmember on fee lands, not Indian lands. Secondly,
8 I don't perceive any legitimate Indian interest here, because
9 we're talking about, not the mountain area, the 400,000 acres
10 set aside for the tribal wildlife commissary, we're talking
11 about the lowlands that theoretically all of which could ulti-
12 mately end up in non-Indian lands; also, a commodity, a
13 wildlife commodity in which the Indians historically have not
14 shown a particular interest right up to the present day, as
15 admitted by their own tribal historian. They showed no
16 particular interest in the waterfowl or upland game birds.

17 Additionally, there appears to be a conflicting
18 federal policy in that the allotment policy of 1887 and 1920
19 was aimed at bringing the Indian in close contact with the
20 whites to advance Indian civilization. Moreover, in implement-
21 ing that Act, there was an overt act by the Federal
22 Government vesting fee title in the non-Indian without any
23 reservations or restrictions. Moreover, in the Allotment Act
24 of 1920, although there were discrete reservations made for
25 power sites and for mineral, there was no reference to hunting

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1 and fishing. And of course, Congress has refused the oppor-
2 tunity to expand Section 1165 which prohibits hunting and
3 fishing on Indian or trust lands to include non-fee lands.

4 In addition, if this Court approves Resolution
5 74-05, it seems to me that some rather serious constitutional
6 questions are raised, and I would just briefly touch upon
7 those.

8 This is not a case -- unlike some of the others --
9 where a tribe is trying to preserve to themselves a part of
10 the wildlife resource. They are attempting to confiscate what
11 is normally an inherent constituent value of fee title to land,
12 and that is the non-Indian's right to hunt and fish on his fee
13 lands or to permit anyone he wants to to come on there and
14 hunt and fish on that land.

15 Moreover, that particular regulation or resolution
16 has been actively supported by the United States in a number
17 of ways ever since it's been enacted. And of course the
18 Wilmington Parking Lot v. Burton case comes immediately to
19 mind, wherein the forces of the state or the power of the
20 state was placed behind discriminatory conduct, this Court
21 said that was state action.

22 The action on the part of the United States in this
23 case, under the Fifth Amendment, is much more overt and much
24 more active, including, of course, this lawsuit itself.

25 And additionally, I would like to focus upon

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1 Holt Civic Club v. Tuscaloosa, which again raises a very, very
2 serious question as to extraterritorial jurisdiction of a city.
3 There, in a split decision, this Court apparently approved
4 the extraterritorial powers of the city because they affected
5 nonresidents of the city, ergo there was no confiscation of
6 the voting right; and secondly, on the basis that it encom-
7 passed only minor things, but did not encompass taxation,
8 zoning, or eminent domain. All of these latter, of course,
9 appear to be desires of the Crow Tribe to have vindicated by
10 this particular lawsuit.

11 I would like to reserve the rest of my time for
12 rebuttal. Thank you very much.

13 MR. CHIEF JUSTICE BURGER: Very well, Mr. Roth.
14 Mr. Claiborne.

15 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,
16 ON BEHALF OF THE RESPONDENTS

17 MR. CLAIBORNE: Mr. Chief Justice, may it please the
18 Court:

19 I'll begin, if I may, by addressing the river bed
20 issue, as it has been called, partly because the focus has been
21 there and rightly so. It may indeed be the only live issue in
22 this case, depending on how the Court resolves that issue.

23 I say that --

24 QUESTION: You say, "rightly so," Mr. Claiborne.
25 It's been a little confusing to me, perhaps I don't, perhaps,

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1 fully understand this case.-- why the ownership of the river
2 bed is crucial or critical in a right to regulate fishing
3 case? Generally, the ownership of the bed of a river becomes
4 important in a case where somebody wants to take sand or
5 gravel out of the bed, or something more valuable like oil
6 or minerals, precious or otherwise. But up until now, I don't
7 think that's been the critical fact insofar as regulation of
8 fishing or hunting. Has it?

9 MR. CLAIBORNE: Indeed. And as Your Honor may have
10 noted, we began in our brief by wondering why the bed of the
11 river rather than the fishing of the river --

12 QUESTION: Right.

13 MR. CLAIBORNE: -- was the issue here? The answer
14 is twofold: first, that the petitioners rightly or wrongly
15 have at all stages of this case conceded that if the Tribe,
16 or the United States for the benefit of the Tribe, owns the
17 bed, they then enjoy, the Tribe enjoys an exclusive fishery
18 within the reservation.

19 QUESTION: Fish aren't in the bed of the river,
20 they're in the river.

21 MR. CLAIBORNE: That is the premise on which the
22 petitioners have argued this case throughout.

23 QUESTION: Well, it didn't sound like you --
24 in this Court, Mr. Claiborne.

25 MR. CLAIBORNE: Mr. Justice White, it seems to me

1 there was a somewhat change of emphasis under perhaps prompt-
2 ing from the Court, but the briefs in all courts and the ar-
3 guments until today were entirely premised on that concession.

4 QUESTION: Well, Mr. Claiborne, the easy answer --
5 not the easy, but one answer to Justice Stewart's question is
6 that if you -- if someone owns the riverbed but someone else
7 has a right to fish in the river as long as he doesn't touch
8 the bottom, he can be prosecuted for trespass if he gets out
9 of his boat and --

10 QUESTION: That's right. He can float down the
11 river, no matter who owns the bed, and fish.

12 MR. CLAIBORNE: Well, the federal statute 1165
13 has been construed as covering not merely trespassing,
14 touching the bottom, either with the hook or with the feet,
15 but also of fishing the overlying waters if the underlying
16 land is tribally owned --

17 QUESTION: Do you think that follows?

18 MR. CLAIBORNE: It has been the understanding, the
19 interpretation --

20 QUESTION: In this litigation?

21 MR. CLAIBORNE: -- of Section 1165. That was the
22 premise of the Finch prosecution which came to this Court,
23 which was vacated on wholly independent grounds. But no one
24 questioned -- in that litigation, nor in this secondary
25 litigation -- the notion that it would violate that federal

1 statute to fish even without touching the bottom.

2 QUESTION: Well, do you think it would violate --
3 how about just floating the river without fishing? Can the
4 Tribe exclude people from the river under your view of the
5 case?

6 MR. CLAIBORNE: No. There is no suggestion that
7 they can do so, because the Tribe was --

8 QUESTION: Well, the river is within the tribal
9 boundary, within Reservation boundaries, and the statutes say
10 that they can exclude people from the Reservation.

11 MR. CLAIBORNE: Indeed, Mr. Justice White, but just
12 as the State --

13 QUESTION: Not on the river, eh? Is that it?

14 MR. CLAIBORNE: Only because of the paramount
15 federal navigational servitude which, arguably at least, has
16 a corollary for the benefit of the public at large, that is
17 a public right of navigation on navigable rivers up through
18 the United states.

19 QUESTION: So, there's a right to navigate, but not a
20 right to fish?

21 MR. CLAIBORNE: That is so.

22 QUESTION: I mean, that's your claim?

23 MR. CLAIBORNE: Yes.

24 QUESTION: And what is your response to the Equal
25 Footing argument?

1 MR. CLAIBORNE: Well, we begin with the Shively case
2 followed in any number of cases, the most recently affirmed
3 in this Court in the Choctaw case, that there is, in the words
4 of Shively, "undoubted power in the United States before
5 statehood to grant away or to reserve to itself for a special
6 purpose the beds of navigable rivers which would otherwise
7 inure to the future state."

8 We had not supposed that that proposition was open
9 to reexamination in this case. And indeed, my brother seemed
10 not to challenge that settled proposition.

11 QUESTION: That is, the power of the United
12 States?

13 MR. CLAIBORNE: The power of the United States.

14 QUESTION: Within at least some limitations, at
15 least, according to Shively?

16 MR. CLAIBORNE: Indeed. It must be done for a pub-
17 lic purpose --

18 QUESTION: Ordinarily.

19 MR. CLAIBORNE: -- and clearly, though, it is per-
20 haps proper to say that the extent to which the presumption
21 against its being done varies according as the beneficiary
22 is an individual private person who would be obtaining a spe-
23 cial privilege by a piecemeal grant of some part of the river
24 bottom, as opposed to a political society, a point made in the
25 Choctaw opinion, such as an Indian tribe granted a large

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1 territory from which the white public was specifically in-
2 tended to be excluded.

3 QUESTION: Well, how do you distinguish the Cor-
4 vallis case, then?

5 MR. CLAIBORNE: Mr. Justice Rehnquist, I recognize
6 that there is language in the Corvallis case which may cast
7 doubt on what had otherwise been thought to be settled law
8 but the Corvallis case in its holding does not in any way
9 question the power before statehood of the United States to
10 grant away the beds of navigable rivers, as I understand the
11 case. I concede that there is language which could be read as
12 pointing in that direction.

13 QUESTION: You would agree with Mr. Roth that there
14 is some tension between this aspect of the Equal Footing
15 Doctrine and cases such as Choctaw?

16 MR. CLAIBORNE: There is some tension, yes,
17 Mr. Justice. I would have thought there was some tension
18 between the rule that the public land in the west belongs to
19 the United States while in the east it does not -- a much more
20 -- tension, yet, as a proposition not yet questioned in
21 this Court, this Court.

22 At all events, I begin with the assumption that
23 the Court is not reexamining the power of the United States
24 to grant away at least in circumstances where there is a plain
25 public purpose to be served. And I may say that the Choctaw

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1 case is not standing alone in so ruling. Not only did
2 Shively, almost a hundred years ago, seem to settle that
3 proposition quite clearly, but the Alaska Fisheries case is a
4 clear statement that the United States in the territorial
5 period may reserve for the benefit of the Indians sub-
6 merged lands and tidelands which would otherwise be held in
7 trust for the future State, and the State of Alaska, since
8 statehood, has not challenged the effectiveness of the
9 Annet Reservation in Alaska, which was recognized in that
10 case, in the Alaska Fisheries case, as including both the
11 waters and the beds.

12 Now, I may say that at the beginning, there may have
13 been a question whether the navigational servitude of the
14 United States, while remaining as a power in the Federal
15 Government necessarily had its full corollary of allowing
16 strangers to come into the heart of the Reservation by boat.

17 QUESTION: Isn't that generally what follows from the
18 navigational servitude, a public right of access to navigable
19 streams to traverse a stream?

20 MR. CLAIBORNE: But it may be, Mr. Justice Stewart,
21 that in the case of an entire territory which is sealed off,
22 as this was intended to be, with an explicit promise by the
23 United States to let no one enter except by permission of the
24 Tribe, that the public right to come on this relatively small
25 river, which may not have been so clearly viewed as navigable,

1 was to some degree diminished.

2 QUESTION: Or maybe the navigational servitude was
3 eliminated too, extinguished. And if what you say -- naviga-
4 tional servitude either exists or it doesn't, and I haven't
5 heard about a claim that it exists partially.

6 MR. CLAIBORNE: It may have different aspects, as
7 we know from the Kaiser Aetna case. The power of the United
8 States to withhold a permit for activities within navigable
9 waters may not necessarily grant the public at large a right
10 of free entry. And what is more --

11 QUESTION: Well, generally, that is what the fed-
12 eral navigational servitude implies, is it not?

13 MR. CLAIBORNE: Well, it does have two aspects. One
14 is the power in the United States to use for public purposes
15 the flow of that river, and the other is the corollary power
16 or right of the public to enjoy freely without toll -- for
17 commercial purposes, primarily. Here, originally, there would
18 have been no reason for anyone to enter on the Big Horn River
19 entirely encircled by Crow lands. Since they were going from
20 nowhere to nowhere except within the Crow Reservation from
21 which they were excluded, could not land, and in our submission
22 could not fish, there would have been no purpose in conceding
23 their right of entry. It may be in that light that the
24 treaty spoke of the boundary as cutting off the river.

25 Today, however, we would concede that as just as

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1 the public highways that traverse the Reservation are open
2 to the public, so is the river for purposes other than fishing.
3 And I stress here that the treaty, if it did not reserve the
4 bed to the Tribe, may nevertheless have reserved the fishery
5 or it may have reserved the water, in the sense that the pub-
6 lic were not invited into the heart of this Reservation for
7 the purpose of sharing the wildlife that abounds there. And
8 while there were no trout at that time, there were presumably
9 waterfowl and other game.

10 QUESTION: Mr. Claiborne, do you accept the 9th
11 Circuit's ruling with respect to nonmember fee owners?

12 MR. CLAIBORNE: We do accept that ruling.

13 QUESTION: Although it is somewhat inconsistent
14 with your basic theory, is it not?

15 MR. CLAIBORNE: Yes. We however --

16 QUESTION: You accept it because you --

17 MR. CLAIBORNE: We approach it much as the 9th
18 Circuit did, that there is a tension between the exclusive
19 reservation for the benefit of the Tribe of this territory and
20 what can be viewed as congressional invitation to nonmembers
21 to enter upon and purchase lots within that reservation.
22 Those two federal declarations have to be accommodated.

23 QUESTION: Well, when you accommodate them, what do
24 you do about the riverbed in those places of the river where
25 the riparian owners are fee owners, nonmember fee owners?

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1 MR. CLAIBORNE: We do not concede that the riparian
2 fee owner has a right to fish in the river, and I may say that
3 the Namen case --

4 QUESTION: Didn't the 9th Circuit say that they did?

5 MR. CLAIBORNE: No, Mr. Justice White. The 9th Circuit
6 said that they could hunt and fish on their own land but --

7 QUESTION: Well, that's what I mean.

8 MR. CLAIBORNE: But they have no riparian subsoil
9 ownership or --

10 QUESTION: How can you fish on land?

11 MR. CLAIBORNE: Well, there are fishing places
12 within -- the lands.

13 QUESTION: Well, that's what I, now --

14 MR. CLAIBORNE: Nonnavigable.

15 QUESTION: Let's assume that on both sides of the
16 river there's a nonmember fee owner, and that they both live
17 on their property. Now who owns the riverbed between those
18 two pieces of property under the 9th Circuit?

19 MR. CLAIBORNE: If this is nonnavigable? Are we
20 talking about the Big Horn River or -- ?

21 QUESTION: We're talking about the Big Horn River.

22 MR. CLAIBORNE: Well, according to the 9th Circuit
23 the ownership of the bed is in the Tribe or in the United
24 States Government for the Tribe.

25 QUESTION: But the riparian owners may nevertheless

1 fish in the river?

2 MR. CLAIBORNE: No, not under the 9th Circuit's
3 holding.

4 QUESTION: I thought you said that they can fish on
5 their own land?

6 MR. CLAIBORNE: On their own land if they have a
7 fishing pond or if it's a nonnavigable stream, such as the
8 Little Big Horn, to which they are riparian, and where they
9 would own to the middle -- of the river.

10 QUESTION: I understand that. I understand that.
11 You don't think that the 9th Circuit would indicate at all
12 that the riparian owner on the Big Horn could fish in the
13 river?

14 MR. CLAIBORNE: Indeed, the 9th Circuit explicitly
15 said the opposite, and so had the -- in the Namen case in-
16 volving the Flathead Reservation, where the 9th Circuit upheld
17 the Tribe's claim to the bed of the Flathead Lake, just as it
18 did here, and while it conceded the riparian right of the fee
19 owners to wharfage and to access for navigation to the lake,
20 it denied them the right to fish in the lake. So here.

21 QUESTION: But the riparian owners here on the Big
22 Horn may navigate?

23 MR. CLAIBORNE: They may put their boats in the
24 river but they may not fish because that fishery is a
25 part of the reserve that was originally set apart for the

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1 tribe. It's perhaps important to stress that the only live
2 controversy so far as the record in this case discloses, and
3 indeed so far as any other information available to me re-
4 veals, is with respect to hunting and fishing on the Big Horn
5 River. There could be issues about a fee owner away from
6 the river using his land to invite hunting or fishing parties,
7 fishing in this case of nonnavigable ponds or streams. That
8 so far as we're aware has not become a problem. What is
9 more, the Tribe concedes, though perhaps it need not, that
10 it will not press its claim so as to ignore fencing or posting.
11 So that as a practical matter the fee owners having been con-
12 ceded by the Court of Appeals a right to hunt and fish on
13 their own lands, the Tribe having not pressed their claim to
14 do likewise on those parcels, the only areas which are ser-
15 iously contested are the Big Horn fishery, both in terms of --
16 and hunting of wildfowl there. And there is no suggestion
17 that the riparian owner owns any part of the bed. The only
18 claim made is in the name of the State, and the question is
19 whether the State by either owning the bed or by purchasing
20 two strategically located lots on the edge of the river can
21 effectively defeat what had been the exclusive right of the
22 tribe to use that resource by inviting the world in.

23 And we're not talking about white owners who live on
24 the reservation, or even if --

25 QUESTION: Do you suggest that the result in this

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1 case would have been different had it been brought by non-
2 Indian residents and owners of land on the Reservation?

3 MR. CLAIBORNE: It would certainly present a much
4 more attractive case from the point of view of the plaintiffs,
5 Mr. Justice Rehnquist. The true claimants here are total
6 outsiders who neither own nor live on the Reservation, who
7 live in Billings or in Hardin and who come by the thousands
8 and fish and hunt on the Big Horn River, and thereby effec-
9 tively destroy what had been and what was thought to have
10 remained to be the special hunting and fishing preserve of
11 the Tribe.

12 QUESTION: Well, the plaintiff is the State of
13 Montana, isn't it?

14 MR. CLAIBORNE: But the State of Montana has not men-
15 tioned these outsiders in any of its briefs. It keeps
16 speaking of the allottee or the person who bought from an
17 allottee --

18 QUESTION: Well, it talks about the State, about the
19 State, and I guess implicitly it means all the residents of
20 the State.

21 MR. CLAIBORNE: But it is to be noticed that non-
22 owners --- they speak about absentee land-owners and
23 owners, but they never speak about total outsiders, total
24 strangers --

25 QUESTION: The general public.

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1 MR. CLAIBORNE: They never speak about State lands,
2 except for the bed of the river. And that is the real bone of
3 contention, whether the world outside through the device of
4 the State having purchased two allotments on the river, can
5 thereby inundate with thousands of fishermen and hunters and
6 crowd out the Tribe whose resource this is guaranteed to be
7 by solemn treaty.

8 One last word about the Equal Footing Doctrine in
9 the bed of the river. We have perhaps over-elaborately
10 attempted to explain why the Holt case is not an obstacle in
11 this case because that case, very plainly involved a situation
12 in which there had been no recognized title in the Band before
13 statehood, and the court simply held that unextinguished but
14 unconfirmed Indian title was not sufficient to defeat what was
15 otherwise the constitutional claim of the state to receive the
16 benefit of navigable waterbeds.

17 Every other case in this Court or any other Court
18 and representing a very substantial body of property, has
19 left the understanding that when the description plainly en-
20 compasses navigable waterbeds, those are included in the con-
21 firmation of the grant to an Indian tribe. The Alaska
22 Fisheries case was perhaps the first to state that clearly,
23 but that was as long ago as 1918. It was restated most
24 recently in the Choctaw case. It has been followed by a host
25 of lower courts, and it is wrong to suggest that if this Court

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1 were once again to endorse that proposition, the states,
2 Montana and its neighbors, would lose what they thought they
3 had. The understanding in law has been for now 70 years that
4 in circumstances such as these, and these are particularly
5 clear ones because of the description.

6 QUESTION: Well, what do you do with the language
7 from Shively v. Bowlby about, upon which you apparently
8 rely, where the Court says, "Although the title to the
9 soil under the tidewaters of the Bay" -- and this is San Fran-
10 cisco Bay -- "was acquired by the United States by cession from
11 Mexico equally with the title to the upland. They held it
12 only in trust for the future State." How can you hold some-
13 thing in trust for a future state and yet convey it away?

14 MR. CLAIBORNE: Well, the very case, Mr. Justice
15 Rehnquist, says, we cannot doubt that Congress has the power
16 to make grants of land below high water mark of navigable
17 waters in any territory of the United States whenever it be-
18 comes necessary to do so in order to perform its national obli-
19 gations, or to effect the improvement of such lands for the
20 promotion and convenience of commerce with foreign nations
21 and among the several states, or to carry out other public
22 purposes appropriate to the objects for which the United States
23 holds the territory. This Court in Alaska Fisheries expressly
24 held that the creation of an Indian Reservation was an appro-
25 priate object for which the United States held the territory.

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1 So that the Shively case, while saying, now, normally, the
2 United States holds the title --

3 QUESTION: And that is the presumption in the
4 absence of a conveyance?

5 MR. CLAIBORNE: Yes, indeed.

6 QUESTION: Isn't that it?

7 MR. CLAIBORNE: But it is only a presumption and it
8 can be overridden, at least provided a public purpose is in-
9 volved; and certainly confirming the diminished territory of
10 the Crow Tribe was such a purpose. My time is up.

11 MR. CHIEF JUSTICE BURGER: Mr. Lynaugh.

12 ORAL ARGUMENT OF THOMAS J. LYNAUGH, ESQ.,

13 ON BEHALF OF THE RESPONDENTS

14 MR. LYNAUGH: Mr. Chief Justice, and may it please
15 the Court:

16 The major concern to the Tribe in this case has been
17 the claim of sport fishing by non-Indians on, over, and in
18 primarily the Big Horn River. In recent years the river has
19 become known as a very good, in fact a blue ribbon trout stream
20 stream, and has attracted many non-Indians from Montana and
21 across the nation.

22 Plaintiffs' Exhibit 30, which appears at page 25,
23 Volume II, of the Joint Appendix indicates surveys that have
24 been taken of the fishermen on various weekends in 1973.
25 One of the major concerns of the Tribe is illustrated in

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1 that survey, and that is, the majority of people who are
2 fishing on the river, and the majority of the people who are
3 duck hunting in the vicinity of the river and over the river
4 are non-Indians who are not local residents, but rather non-
5 Indians who come from the major population centers in the
6 other parts of Montana, or non-Indians who come from other
7 states.

8 The concern of the Tribe is two-fold. It's to con-
9 serve the fish and game within its Reservation, within the
10 totality of the boundaries of that Reservation, as a food
11 source for itself. And also, it has concern about the uncon-
12 trolled influx of non-Indians into the river area, and believes
13 that this will seriously affect the Tribe as an entity.

14 This Reservation is a continuing Indian Reservation.
15 Seventy percent of the land is owned in trust. The majority
16 of the population are Indian residents. The communities with-
17 in the Reservation, the population centers, are Indian communi-
18 ties, not primarily non-Indian communities. The Reservation
19 itself, as a governmental entity, is divided into various dis-
20 tricts which accord with the population centers.

21 We believe that since the major problem is the
22 hunting and fishing in, over, and on the Big Horn River -- and
23 that's the issue presented in this case -- that the problem
24 would be resolved, we believe, by a decision on the issue of
25 ownership of the riverbed, a decision that would say that

1 the riverbed is owned by the Tribe.

2 This river is not a commercial fishery. There are
3 no competing economic impacts between treaty fishermen and
4 non-treaty fishermen. There is no natural run of the fishery
5 beyond the Reservation boundaries, downstream. It's a local
6 fishery.

7 QUESTION: Is it stocked?

8 MR. LYNAUGH: Yes, it is, Your Honor.

9 QUESTION: By whom?

10 MR. LYNAUGH: Your Honor, it is now stocked by the
11 U.S. Fish and Wildlife in conjunction with the Tribe. The
12 U.S. Fish and Wildlife does the stocking. Prior to --

13 QUESTION: Prior to this decision, who did it?

14 MR. LYNAUGH: The State of Montana has done it,
15 Your Honor.

16 QUESTION: So there wouldn't be any fishery at all
17 in the absence of stocking?

18 MR. LYNAUGH: There was a fishery, Your Honor, but --

19 QUESTION: We're talking about a trout fishery,
20 aren't we?

21 MR. LYNAUGH: That's right. There --

22 QUESTION: And there wouldn't be any at all in the
23 absence of stocking, isn't that correct?

24 MR. LYNAUGH: That's correct.

25 QUESTION: Because there's no propagation?

1 MR. LYNAUGH: No, Your Honor, not that I'm aware of.
 2 If this Court decides that the riverbed is not owned by the
 3 Tribe, then the Tribe submits that by virtue of the treaties
 4 of 1868 that it has the exclusive property right to hunt and fish
 5 within the boundaries of its reservation and control hunting
 6 and fishing within the boundaries of the Reservation by the
 7 method suggested in this case, and that is by excluding all
 8 non-Indians except for the resident owners who reside --

9 QUESTION: What authority do you have, or what do
 10 you think the basis is for the tying of ownership of fishing
 11 to the ownership of the river bottom? In all sorts of western
 12 states they are completely separate notions, but your col-
 13 league suggested that throughout this case the assumption has
 14 been that fishing belongs, the fishery belongs to the person
 15 who owns the riverbed.

16 MR. LYNAUGH: I think the negotiations of the treaty
 17 pointed out that the fishing, Your Honor, and the hunting, the
 18 sustenance that can be derived from the sources within the
 19 reservation was very important to the Tribe.

20 QUESTION: That doesn't address my question, does it?

21 MR. LYNAUGH: I think it does from the standpoint
 22 that the total grant made to the Tribe included the river for
 23 that purpose.

24 QUESTION: Well, I would think you would make that
 25 argument even if the State owned the bottom.

1 MR. LYNAUGH: That is our second argument that I was
2 now addressing, Your Honor.

3 QUESTION: Well, so again, I'm asking you, why in
4 this case has the ownership notion been tied to the fishery?
5 Is there some case that you know of that binds the two toge-
6 ther?

7 MR. LYNAUGH: There are -- the issue is addressed --

8 QUESTION: Except this one?

9 MR. LYNAUGH: The issue is addressed in the Alaska
10 Fishery case, I believe, where the beds of the rivers around
11 the island were given to the tribe and that the tribe was al-
12 lowed the right to exclude the public from fishery. I think it's
13 also addressed in the lower court decision in this case in Finch,
14 and also in the lower court decision in the Pollmann case
15 decided by Judge Jameson.

16 QUESTION: But you could either -- do you also con-
17 cede, as I gather the United States does, or states, that the
18 Tribe could not exclude the people from floating the river?

19 MR. LYNAUGH: Yes, I do, Your Honor. I see no in-
20 consistency whatsoever. I think the Commerce Clause itself
21 requires that the United States have the navigation servitude.

22 QUESTION: Does that mean the right of the general
23 public to navigate the river?

24 MR. LYNAUGH: For purposes of floating?

25 QUESTION: For any purpose. To traverse the river.

1 MR. LYNAUGH: I think it does, but I would like to
2 add, Your Honor, that there is -- this is not an artery of
3 commerce. This river is floated only for the purposes --

4 QUESTION: It's a navigable stream.

5 MR. LYNAUGH: --of fishing.

6 QUESTION: It's a navigable stream?

7 MR. LYNAUGH: Yes, it is. It is a navigable stream.

8 QUESTION: And do you concede that the Federal
9 Government has a navigational servitude?

10 MR. LYNAUGH: Yes, Your Honor, I do.

11 QUESTION: And generally a navigational servitude
12 implies a right of the general public to traverse the navigable
13 stream, does it not?

14 MR. LYNAUGH: Yes, Your Honor, that's correct.

15 QUESTION: And do you concede that exists here?

16 MR. LYNAUGH: Yes, I do. But I do not --

17 QUESTION: And -- but with no right to -- the right
18 to traverse, but no right to fish in the water, is that it?

19 MR. LYNAUGH: I don't see --

20 QUESTION: Except by permission of the tribe?

21 MR. LYNAUGH: That's correct.

22 QUESTION: And why, since I've already interrupted
23 you, why -- and this is maybe the same question that my brother
24 White asked you, but perhaps a little broader, why does owner-
25 ship -- why isn't ownership of something quite different from

1 the power to exercise regulation or control over it? In other
2 words, Government has the conceded power to regulate the speed
3 of vehicular traffic but it doesn't assert that it owns those
4 automobiles.

5 MR. LYNAUGH: I think we felt that it was a separate
6 theory and on --

7 QUESTION: They are separate, aren't they? They're
8 separate concepts, and one makes sense without the other.

9 MR. LYNAUGH: I think we believed it was a right that
10 went along with ownership of the riverbed itself.

11 QUESTION: But it may exist even without ownership,
12 may it not?

13 MR. LYNAUGH: The property right in the hunting -- ?

14 QUESTION: No, the power to regulate?

15 MR. LYNAUGH: That's correct. Yes.

16 QUESTION: Without any ownership whatsoever?

17 MR. LYNAUGH: That's correct, Your Honor.

18 QUESTION: Then why so much emphasis on the ownership
19 argument? Ownership of the bed?

20 QUESTION: Well, it certainly makes an awful lot
21 of difference, how you fish a stream, who owns the bed. If
22 somebody who owns the bed doesn't want you to fish --

23 MR. LYNAUGH: I think one answer to the question,
24 Your Honor, if I may, is that the ownership issue is rele-
25 vant from the standpoint that if the bed was owned by the

1 Tribe, then it would fall into a trust status, and I think
2 it would fall under, then, the purview of --

3 QUESTION: It's the converse --

4 MR. LYNAUGH: 1165.

5 QUESTION: The converse of that I'm driving at.

6 Obviously, you have one situation if you own the bed, but do
7 you need to assert ownership of the bed to assert control of
8 the fishing?

9 MR. LYNAUGH: No.

10 QUESTION: Is any part of the Big Horn Lake on the
11 Reservation?

12 MR. LYNAUGH: Are you talking about an area --

13 QUESTION: Any part of the lake above the dam?

14 MR. LYNAUGH: It's within the boundaries of the
15 reservation, but part of it, taken for the construction of
16 Yellowtail Dam, above the dam site, but there is no --

17 QUESTION: So that the bottom of the lake is not
18 involved in this case?

19 MR. LYNAUGH: That's correct, Your Honor.

20 QUESTION: Thank you.

21 MR. LYNAUGH: It's the bottom of the riverbed that
22 flows below the dam and the afterbed.

23 It is our feeling that we do have an exclusive
24 property right to hunt and fish within the boundaries of the
25 Reservation, excepting the one exception that was made by the

1 9th Circuit as to fee-resident owners. But we do not believe
2 that in balancing the allotment acts with the original
3 intent of the treaty, that the rights of the Tribe to exclu-
4 sive use of its Reservation have been abolished to the point
5 where they cannot exclude non-Indian sport fishermen from
6 coming within the Reservation and using the resource.

7 There is no express indication in the record that
8 that right to exclude others, non-Indian sportsmen, from the
9 Reservation hunting and fishing has been done. I think, once
10 again, this is an ongoing governmental body, this is a tribal
11 body that's operating and actively practising its culture.
12 Seventy percent of the land is currently in trust. Under
13 Section 14 of the Allotment Act, which appears at the Peti-
14 tioners' Appendix at 105, and the page at 116, there is a pro-
15 vision where land can actually pass back from fee status into
16 trust status, and the Tribe is actively involved in trying to
17 repurchase some of the land that has gone out of the trust
18 status, to maintain its culture and to maintain its majority
19 impact within the boundaries of its Reservation.

20 If this Court were not to grant the exclusive right
21 to control hunting and fishing within the boundaries of the
22 Reservation, then I think the Reservation would become
23 diminished without express congressional enactments. And
24 also, it would greatly reduce and almost make meaningless the
25 attempt by the Tribe to regulate, a regulation that I think

1 has been recognized by Petitioners, to control hunting and
2 fishing on trust lands, to control non-Indian access to trust
3 lands for hunting and fishing, because of the nature of the
4 combination of fee land and trust land.

5 I would like to point out and read a paragraph, be-
6 cause I believe it is important. In Volume II of the Joint
7 Appendix -- it's Tribal Exhibit 71qq, it appears starting
8 at page 86 of that volume.

9 QUESTION: 86, did you say?

10 MR. LYNAUGH: Yes, Your Honor, 86. And it's a letter
11 from the Superintendent of the Crow Agency to the Area Direc-
12 tor, the Bureau of Indian Affairs, in Billings. And it's a
13 letter that actually attached to the resolution that's in ques-
14 tion here, Resolution 7405. It's stated there, on page 87:

15 "Hunting pressure on the reservation has increased
16 to a point where game is depleted or nonexistent in
17 vast areas. New highways, increases in population,
18 prosperity and inflated food prices contribute greatly
19 to the influx of sportsmen, meat hunters and poachers."

20 At the bottom of the page, and I think the critical
21 paragraph 4(a):

22 "The general public has taken advantage of inter-
23 spersed fee and Indian trust lands to utilize the whole
24 reservation without respect to land status because the
25 State of Montana takes no responsibility for the

1 policing of Indian lands, the Crow Tribe does not have
2 the funds, the police force, nor the authority to protect
3 their lands and the Department of the Interior has not
4 taken effective action to curtail violations. Enforce-
5 ment is so impractical that with this knowledge the
6 general public utilizes the whole reservation as a haven
7 for unlimited hunting and fishing."

8 QUESTION: Mr. Lynaugh, if you are relying rather heavily
9 in your brief on Alaska Pacific Fishery v. United States;
10 what do you make of the language in that case where the Court
11 says about Reservation v. Alaska, "The reservation was not in
12 the nature of a private grant but simply a 'setting apart
13 until otherwise provided by law' of designated public property
14 for a recognized public purpose."

15 Would you not say that the admission of a state to
16 the Union came within the definition of "as otherwise provided
17 by law" in that language?

18 MR. LYNAUGH: Notwithstanding that sentence, Your
19 Honor, my reading of the Alaska Fishermen's case is that the
20 Government intended clearly to convey title to the waters
21 around the island of that Tribe to the Tribe.

22 QUESTION: Then that -- the language, "as other-
23 wise provided by law" would not include an Act of Congress
24 admitting a state to the Union?

25 MR. LYNAUGH: I think the grant was made prior --

1 QUESTION: It was; there's no question. But --

2 MR. LYNAUGH: And I think that the Government in-
3 tended to make the grant. And I believe Alaska had yet to
4 attain --

5 QUESTION: Even though the grant were made earlier,
6 the language from the Alaska Fisheries opinions read to you
7 by my brother Rehnquist would indicate that the grant was a
8 temporary grant or a conditional grant, wouldn't it? Subject
9 to a condition subsequent?

10 MR. LYNAUGH: I don't --

11 QUESTION: Wouldn't that language so indicate?

12 MR. LYNAUGH: I just believe there's other language
13 in the decision that clearly shows the intent.

14 QUESTION: Well, what about that language rather
15 than other language of the decision?

16 MR. LYNAUGH: I think it's foreshadowed by the other
17 language in the decision, Your Honor.

18 In addition to the paragraphs I've read and the
19 Exhibit that appears at page 88-89, there's also a paragraph
20 that indicates, at the bottom of page 89, that the Crow Tribe's
21 action to close the reservation to the public was very unpopu-
22 lar with the general public and caused retaliations in the
23 form of some economic sanctions being taken against the Tribe,
24 not being able to get credit as easily as they might have been
25 able to in the past, things of this nature.

1 In summary, I think the Tribe believes that some
 2 balancing of the treaty rights with current day situations
 3 exists, and that the 9th Circuit made a valiant attempt to do
 4 this by carving out an exception for the resident fee owners.
 5 We think there is a great deal of rationale involved with
 6 that exception, because the resident fee owner is actually
 7 contributing to the Reservation economy within the boundaries
 8 of the Reservation, in many instances.

9 The Reservation economy is an agricultural economy.
 10 The non-Indian is usually leasing lands from Indians and thus
 11 contributing to the support of Indians within the Reservation.

12 Also, the pressure that the non-Indian would put on
 13 the hunting and fishing within the Reservation is slight com-
 14 pared to the pressure that would be placed on the Reservation
 15 by virtue of the opening of the river to non-Indian hunters
 16 and fishers from without the State of Montana and a great
 17 deal from within.

18 Therefore, we believe, with regard to the power to
 19 hunt and fish as a property right and the power to exclude
 20 non-Indians who are not residents, that power has not been
 21 abrogated from the treaty.

22 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lynaugh.
 23 Do you have anything further, Mr. Roth?

24 ORAL ARGUMENT OF URBAN L. ROTH, ESQ.,
 25 ON BEHALF OF THE PETITIONERS -- REBUTTAL

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MR. ROTH: If it please the Court, I do.

I'd like to comment briefly upon Crow Tribe Exhibit 71qq which apparently states that there is a shortage of fish and game caused by the influx of non-Indian hunters. The unfortunate part of that letter is that the Tribe was either unwilling or unable to support that assertion in the letter at trial. They basically had one witness there, the chief game warden -- who, by the way, is one of eight tribal game wardens -- Bud Fritzler testify.

Mr. Fritzler, page 263 of the transcript, indicated that he stopped, I believe, 20 to 30 non-Indian fishermen and inquired of them what they were doing. At 269, I believe it is, he cited one incident involving non-Indian having coolers full of fish. Superimposed upon this and I think significant in light of this Court's recent decisions in Sea Coast Products v. Douglas, and Hughes v. Oklahoma, is the fact that the Tribe has done absolutely nothing with regard to preserving this scarce resource by controlling the acquisition of wildlife and fish by tribal members.

Tribal members are free to hunt at any season. The record is replete with examples of the fact that they exercise that right in all seasons, including in the spring, when the cow elk is pregnant; including later on, when the fawn is by her side.

QUESTION: How about limits?

1 MR. ROTH: No limits, Your Honor, absolutely none.
2 But I think significant, as far as the issues in this case are
3 concerned, is the fact that to this day they do not have a
4 significant interest in the fishery. Moreover, as we have
5 already indicated, it's a put-and-take fishery, and Montana
6 was putting the fish in and its fishermen were merely taking
7 them out again. So it wasn't a commodity that was supplied
8 by the Tribe at all nor even introduced on the Reservation.
9 by the Tribe.

10 So this bare assertion that for some reason the
11 wildlife resource is endangered just isn't true. Now, with
12 regard to --

13 QUESTION: No, but to my knowledge, if the game is being
14 taken for food, that's as distinguished from sport. There is
15 a difference, isn't there?

16 MR. ROTH: Yes, there is. And certainly I think
17 this Court, as in *Washington v. Fishing Vessel Association*,
18 has shown a regard for Indian interests, Indian tribes having
19 a percentage of the resource; that's true. But in this partic-
20 ular case, if it please Your Honor, there is no evidence that that
21 particular portion of the wildlife resource is not available
22 to supply them with food. And I'm sure, if the pressure on
23 the wildlife resource of the Reservation became too heavy,
24 then the federal courts, as they did in *Washington v. Fishing*
25 *Vessel Association*, could at the behest of the Tribe allocate

1 some percentage of the resource to the Tribe and some per-
 2 centage to the non-Indians and regulate perhaps even the
 3 number of fishermen and hunters who would enter on the Reser-
 4 vation. But in doing so, they would balance the interests of
 5 both and would consider whether or not there was indeed pres-
 6 sure upon that resource, which, of course, there is no evi-
 7 dence of there being any substantive impact upon the resource
 8 in this particular case.

9 With regard to the denigration of the Holt case, I
 10 would think that the case of Minnesota v. Hitchcock, which
 11 preceded United States v. Holt State Bank, and in which this
 12 Court made a study of all of the preexisting treaties leading
 13 up to the creation of the Red Lake Reservation would have put
 14 to rest that particular comment upon the whole case.

15 Thank you very much.

16 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
 17 The case is submitted.

18 (Whereupon, at 11:30 o'clock a.m., the case in the
 19 above-entitled matter was submitted.)

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CERTIFICATE

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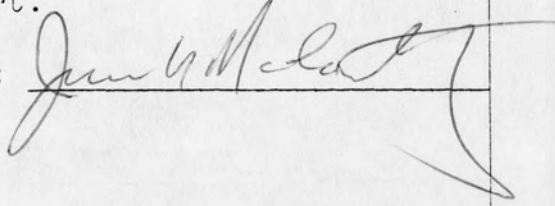
No. 79-1128

THE STATE OF MONTANA, ET AL.

V.

THE UNITED STATES OF AMERICA
AND THE CROW TRIBE OF INDIANS

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