SUPREME COURT OF THE UNITED STATES

No. 00–189

IDAHO, PETITIONER *v.* UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2001]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court makes out a plausible case for the proposition that, on the day Idaho was admitted to the Union, the Executive Branch of the Federal Government had intended to retain in trust for the Coeur d'Alene Indian Tribe the submerged lands under a portion of Lake Coeur d'Alene. But the existence of such intent on the part of the Executive Branch is simply not enough to defeat an incoming State's title to submerged lands within its borders. Decisions of this Court going back more than 150 years establish this proposition beyond a shadow of a doubt.

"[T]he ownership of land under navigable waters," it bears repeating, "is an incident of sovereignty." *Montana* v. *United States,* 450 U. S. 544, 551 (1981). Recognizing this important relationship, this Court "announced the principle that the United States held the lands under navigable waters in the Territories 'in trust' for the future States that would be created." *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 196 (1987) (quoting *Lessee of Pollard* v. *Hagan,* 3 How. 212, 230 (1845)). That duty may not lightly be disregarded, and, as the Court rightly observes, our inquiry "begin[s] with a strong presumption against defeat of a State's title." *Ante*, at 9 (internal quotation marks and citations omitted). Accordingly, "dispos-

als [of submerged lands] by the United States during the territorial period . . . should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926); see also *Montana, supra,* at 552 ("[The Court] must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream") (internal quotation marks and citations omitted).

The Court makes three critical mistakes in its application of the equal footing doctrine here— errors that significantly dilute the doctrine. First and foremost, the Court misconceives the scope of historical events directly relevant to the question whether Congress *had*, by July 3, 1890, acted to withhold title to submerged lands from the entering State of Idaho. At the very moment that Idaho entered the Union "on an equal footing with the original States," Act of July 3, 1890, ch. 656, 26 Stat. 215, Congress and the President vested in Idaho the accoutrements of sovereignty, including title to submerged lands. It is therefore improper for the Court to look to events after Idaho's admission in order to discern whether Congress had months or years previously intended to divest the entering State of its submerged lands. Indeed, I am aware of no case applying the equal footing doctrine to determine title to submerged lands in which this Court has looked beyond the moment of statehood for evidence of federal intent.

Our decision in *United States* v. *Alaska,* 521 U. S. 1 (1997), is particularly illustrative of the timeframe relevant to our inquiry. That case concerned in part Alaska's assumption of title to submerged lands within the National Petroleum Reserve-Alaska (Reserve) and the Arctic National Wildlife Refuge (Refuge). See *id.*, at 4. In stark

contrast to today's decision, the Court in its lengthy discussion in *Alaska* resisted entirely the temptation to delve into the treatment of the lands in question in the months and years following Alaska's admission to the Union in 1959. And the invitation to do so hardly could have been more obvious with respect to the Refuge, which had been "set apart" as a wildlife reservation but had not yet been formally approved by the Secretary of the Interior. *Id.*, at 46–47. "This application," the Court observed, "was still pending in July 1958, when Congress passed the Alaska Statehood Act, and in January 1959, when Alaska was formally admitted to the Union." *Id.*, at 46. Although the Court noted that the application was approved several months after Alaska's admission, the Court considered the pending application as relevant only insofar as it put Congress on notice of the action. See *id.*, at 56. The *Alaska* Court did not give– contrary to the Court's reasoning in the present case– any import to the fact that the application ultimately was approved. Indeed, *Alaska*'s focus on the instant of statehood as the crucial moment of inquiry could hardly be more clear. See, *e.g.*, *id.*, at 42 ("The conclusion that Congress was aware when it passed the Alaska Statehood Act that the Reserve encompassed submerged lands is reinforced by other legislation, *enacted just before Alaska's admission to the Union*, granting certain offshore lands to the Territory of Alaska"); *id.*, at 55 ("We now consider whether, *prior to Alaska's admission to the Union*, the United States defeated the future State's title to the submerged lands included within the proposed Range") (emphases added). Other cases indicate a similar emphasis. See, *e.g.*, *Utah Div. of State Lands*, 482 U. S., at 195; *Montana*, 450 U. S., at 551.[1]

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[1] The Court of Appeals stated that "we are aware of no rule forbidding consideration of such [post-statehood] events. Indeed, the case law may

Accordingly, insofar as the submerged lands at issue here are concerned, it is of no moment that Congress ultimately ratified the 1887 and 1889 negotiations. See *ante*, at 16. Well before it took such action, Congress had given its assent to Idaho's entry into the Union as a sovereign State and thereby joined with the Executive to extinguish the Federal Government's right to withhold title to submerged lands. It follows that Congress' acceptance of the fact that "the Coeur d'Alene Reservation shall be held forever as Indian land," *ibid.*, does nothing to explain whether submerged lands were within that reservation at the time of– much less eight months after– Idaho's admission. By the same token, our inquiry is not illuminated by Congress' attempt in 1891 to affirm Chief Seltice's purported conveyance of certain lands to Frederick Post, see *ante*, at 7, 16, or by Congress' approval in 1894 of the so-called "Harrison cession," see *ante*, at 16–17. Simply put, the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event for the Court to suggest that subsequent events somehow can diminish what has already been bestowed.

Second, all agree (at least in theory) that the question before us is "whether *Congress* intended to include land under navigable waters within the federal reservation and, if so, whether *Congress* intended to defeat the future State's title to the submerged land," *ante*, at 10 (emphasis added). But the Court proceeds to determine this "intent" by considering what obviously are *not* Acts of Congress. Congress itself did authorize negotiations with the Tribe

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suggest the contrary. See *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89–90 (1918)." *United States* v. *Idaho,* 210 F. 3d 1067, 1079, n. 17 (CA9 2000). This citation is puzzling indeed, for Alaska was not admitted to the Union until some 40 years after the Court's decision in *Alaska Pacific Fisheries.*

in 1886 and 1889, but those Acts expressly provided that any resulting agreements were not binding "until ratified by Congress." Act of May 15, 1886, 24 Stat. 44, App. 51; Act of Mar. 2, 1889, 25 Stat. 1002, App. 144. And it is undisputed that ratification did not occur before Idaho gained admission. The Court, however, is willing to divine congressional intent to withhold submerged lands from the State from what are best described as inchoate pre-statehood proceedings. In the Court's view it is sufficient that one house of Congress had acted to approve the agreements and that the other was in the process of considering similar legislation. See *ante*, at 15. The Court thus speaks of the "final" ratification of the 1887 and 1889 negotiations as if the official approval of both houses of Congress was but a mere formality. *Ibid.* But see U. S. Const., Art. I, §7, cl. 2. But the indisputable fact remains that, as of July 3, 1890, "Congress" had passed the Idaho Statehood Act but had not ratified the 1887 and 1889 agreements.

Nor do our prior decisions in this area support the Court's decision to wander so far afield. In *Alaska*, we evaluated the impact of an express provision in the Alaska Statehood Act, Pub. L. 85–508, 72 Stat. 347, reserving certain lands for the United States. 521 U. S., at 41–42. There the evidence that "Congress expressed a clear intent to defeat state title" to submerged lands came in the form of a duly passed federal statute rather than as inferences drawn from preludes to future congressional Acts. *Id.*, 41. Indeed, that Statehood Act abounds in specificity, in §11(b) directly identifying the Reserve, and in §6(e) defining other reserved lands in some detail.[2] So, too, in *Utah*

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[2] Again, the Court's reliance on language contained in the Idaho Statehood Act affirming the Idaho Constitution is unavailing. See *ante*, at 7. Clauses indicating that the entering State "forever disclaims all right and title to . . . all lands . . . owned or held by any Indians or

Division of State Lands we evaluated prestatehood federal statutes without reference to inchoate proceedings lacking the force of law. 482 U. S., at 198–200 (discussing the impact on Utah's claim to certain submerged lands of the Sundry Appropriations Act of 1888, 25 Stat. 505, and the Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371). Cf. *Montana, supra,* at 550–555 (considering whether certain treaties vested property rights in the Crow Indians). We thus wisely have not relied on this sort of evidence in the past, and it is unfortunate that we embark upon that route today.

Third, despite the critical relationship between submerged lands and sovereignty, the Court makes the unwarranted assumption that any use granted with respect to navigable waters must necessarily include reserving title to the submerged lands below them. As the Court previously has explained, the purpose underlying a reservation of territorial lands is often probative of federal intent. See, *e.g.*, *Alaska*, 521 U. S., at 39. Even accepting the District Court's conclusions regarding the Tribe's dietary habits, and further accepting this Court's inference that Congress was concerned with the Tribe's access

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Indian tribes" were boilerplate formulations at the time, and the inclusion of this language hardly compares to the precision employed in the Alaska Statehood Act. Indeed, every State admitted between the years 1889 and 1912 entered with such a disclaimer. See N. D. Const., Art. 16, §2 (1889); S. D. Const., Art. XXII, §18 (1889); Mont. Const., Ordinance I (1889); Wash. Const., Art. XXVI, §2 (1889); Wyo. Const., Ordinance §3 (1889); Utah Const., Art. III (1894); Okla. Const., Art. I, §3 (1906); N. M. Const., Art. XXI, §2 (1910); Ariz. Const., Art. XX, par. 4 (1910). Tellingly, in each of these Constitutions save Oklahoma's, the relevant language is identical to that in the Idaho Constitution. This disclaimer, in any event, simply begs the question whether submerged lands were in fact "owned or held" by the Coeur d'Alene Tribe upon Idaho's admission.

to navigable waters,[3] it does not necessarily follow that Congress intended to reserve title in submerged lands by authorizing negotiations leading to the cession of portions of the reservation established by the 1873 Executive Order.

It is perfectly consistent with the assumption that Congress wanted to preserve the Coeur d'Alene Indians' way of life to conclude that, if Congress meant to grant the Tribe any interest in Lake Coeur d'Alene, it was more likely a right to fish and travel the waters rather than withholding for the Tribe's benefit perpetual title in the underlying lands. See *Montana*, 450 U. S., at 554 ([Although the treaty] gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches"); see also *ibid.* ("The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance").

For this reason, Congress' decision in 1888 to grant a

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[3] This inference may not be justified. Although Idaho apparently has conceded that the 1873 Executive Order included submerged lands within the reservation, that fact hardly confirms that Congress made a similar statement in simply authorizing negotiations with the Tribe. *United States* v. *Alaska,* 521 U. S. 1 (1997), moreover, indicates that it is at best an open question whether Executive action alone is sufficient to withhold title to submerged lands. *Id.*, at 43–45; cf. U. S. Const., Art. IV, §3, cl. 2 ("The *Congress* shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (emphasis added)). Thus, the majority rests far too much weight on Idaho's concession regarding the 1873 Reservation.

right-of-way to the Washington and Idaho Railroad Company across a part of the Coeur d'Alene Reservation is not clear evidence of Congress' intent with respect to submerged lands. All but a miniscule portion of the right-of-way passes along surface lands, and it crosses the lake only at one of its narrowest points. There is no mention of submerged lands in the authorizing resolution, and it seems obvious that Congress required the company to pay compensation to the Tribe because of the significant impact the railroad would have upon surface lands:

> "[T]he right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid[;] and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent one station for each ten miles of road." App. 138.

Thus, I do not think it just to infer any intent regarding submerged lands from Congress' requirement of compensation for what was to be primarily an intrusion— and a significant one at that— upon surface lands.

In sum, the evidence of congressional intent properly before the Court today fails to rise to anywhere near the level of certainty our cases require. Congress' desire to divest an entering State of its sovereign interest in submerged lands must be "definitely declared or otherwise made very plain," *Montana, supra*, at 552. That standard has not been met here.