CHAPTER 15

TRIBAL PROPERTY

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SECTION 1. DEFINITION OF TRIBAL PROPERTY

Tribal property may be formally defined as property in which an Indian tribe has a legally enforceable interest. The exact nature of this interest it will be the purpose of this chapter to delineate. It will. however, clarify the scope and purpose of the chapter to note certain implications of the formal definition of tribal property here presented.

If tribal property is property in which a tribe has a legally enforceable interest, it must be distinguished, on the one hand, from property of individual Indians, and, on the other hand, from public property of the United States. Actually, we find that tribal property partakes of some of the incidents of both individual private property and public property of the United States. The distinctions on both sides, however, are as significant as the similarities. It may be noted that historically, conceptions of tribal property have oscillated between the two limits of individual private property and public property. When, for instance, Pueblo property was treated like any other private corporate property in the Territory of New Mexico,[1] no special problems of Indian law were presented. Likewise. where lands, although set aside for Indian purposes, have not been the subject of any legally enforceable Indian rights, as is the case perhaps with public lands set aside for the establishment of an Indian hospital or school not restricted to any particular tribe. the lands remain public property of the United States and no question of tribal property is presented.[2]

[1] See Chapter 20. sec. 3.

[2] See Chapter 1, sec. 3, fn 76. Even in the Indian school situation, tribal property rights may be created. In Alaska, for instance, reservations for native education have come to be treated, for most purposes, as Indian reservations. See Chapter 21. sec. 7. Similarly. we may note that the Joint Resolution of January 30, 1897, 29 Stat. 698. authorizing the use of the Fort Bidwell, abandoned military reservation. "for the purposes of an Indian training school," has been construed as establishing an Indian reservation. The Act of January 27, 1913, 37 Stat. 652, refers to "Indians having rights on said reservation."

The distinction between the *fact* of use and enjoyment and the *right* of possession is essential in the understanding of Indian tribal property. The area of land reserved in the Washington Zoo for the exclusive use and occupancy of a herd of buffalo does not, by the fact of such reservation, cease to be the public property of the United States. The buffalo have no legally enforceable interest, no possessory right, in the land. It is true that they are allowed to occupy an area from which other animals and, except for certain Government employees, human beings, may be lawfully excluded. The buffalo, however, cannot bring an action of ejectment and no other party can bring such an action on behalf of the buffalo.

From time to time, distinguished advocates have upheld what may be called the "menagerie theory" of tribal property, under which no rights whatsoever are vested in the Indian tribe.[3] In every case, however, in which this theory has been presented to the Supreme Court of the United States, it has been rejected.[4]

A. TRIBAL OWNERSHIP AND TENANCY IN COMMON

The distinction between tribal property and property owned in common by a group of Indians appears most clearly in connection with the claims repeatedly put forward by descendants of tribal members who are not themselves tribal members and who, under a theory of tenancy in common, would be entitled to share in the common property but, if the property is indeed tribal, have no valid claim thereon. The Supreme Court has made it clear in such cases as Fleming v. *McCurtain*,[5] and *Chippewa Indiana of Minnesota* v. *United States*,[6] that where the Federal Government has dealt with Indians as a tribe no tenancy in common is created, and no descendible or alienable right accrues to the individual members of the tribe in being at the time the property vests. The fact that the plural form is used in describing the grantee does not show an intent to create a tenancy in common nor does a limitation to a tribe "and their descendants" establish any basis for declaring a trust for descendants of individual members.[7]

A second distinction between tribal ownership and tenancy in common relates to the method of transfer. As the Attorney General declared, in the early case of the Christian Indians,[8]

> The gravest of your questions remains to be answered Can these Christian Indians sell the lands thus acquired? The right of alienation is incident to an absolute title. If the patent is not to a nation, tribe, or band, called by the name of the Christian Indians, but to the individual persons included within that designation, then all those persons are patentees, and all hold as tenants in Common. No conveyance can be made but by the lawful deed of all. If any one refuses or is unable to consent, he cannot be deprived of his interest by an act of the others. Some of these persons being children, and some, perhaps, being under other legal disabilities, it will be impossible for any purchaser to get a good title if they are tenants in common.
>
> But I think the patent will vest the title in the tribe. You have mentioned no fact to make me believe that their national or tribal character was ever lost or merged into that of the Delawares. They are treated as a separate people, wholly distinct and different from the Delawares. The land, therefore, belongs to the nation or band, and can be disposed of only by treaty. • • • (Pp. 26–27.)

A third distinction lies in the fact that debts of individuals may be set off against claims of tenants in common but not against claims of tribes. Thus in the case of *Shoshone Tribe of Indians v. United States*,[10] the Government sought to offset, against allowed tribal claims, debts due from individual allottees to the United States for irrigation construction costs. This contention was rejected on the ground that debts of individual allottees were not debts of the Indian tribe.

The essential differences between tribal ownership and tenancy in common are thus analyzed by the Court of Claims in the case of *Journeycake* v. *Cherokee Nation* and the *United States*,[11] in an opinion quoted and affirmed by the Supreme Court:

> The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners. • • • (P. 302.)

Perhaps all of these differences can be summed up in the conception of tribal property as *corporate* property.[12]

B. TRIBAL OWNERSHIP AND INDIVIDUAL OCCUPANCY

Congress has consistently distinguished between the tribal interest in land and the complementary interest of the individual Indian in improvements thereon.[13] Thus, a long series of congressional acts granting rights-of-way across Indian reservations to various railroad companies contain the specification that damages shall be payable not only to the tribe but to individuals, wherever lands are "held by individual occupants according to the laws, customs, and usages" of the tribe in question.[14] Other right-of-way statutes provide in slightly different

[3] Thus, Attorney General Cushing, In his opinion in the *Portage City* Case, 8 Op. A. G. 255 (1856), declared that the making of treaties with Indians and the references in such treaties to "their lands" were errors on the part of the United States.

Today a basic issue of policy in the administration of tribal property "is whether the tribe that 'owns' land will be allowed to exercise the powers of a landowner, to receive rentals and fees, to regulate land-use and to withdraw land-use privileges from those who flout the tribal regulations; or whether the Federal Government will administer tribal lands for the benefit of the Indians as it administers National Menuments, for instance, for the benefit of posterity, with the Indians having perhaps as much actual voice in the former case as posterity has in the latter." F. S. Cohen, How Long Will Indian Constitutions Last? (1939). 6 Indians et Work. No. 10, pp. 40, 41.

[4] See secs. 10–20, *infra*.

[5] 215 U. S. 56 (1909). Accord, *Ligon* v *Johnston*, 164 Fed 670 (C. C. A. 8, 1908), app. dism., 223 U. S. 741. *Cf. United States* v *Charles*, 23 F. Supp. 346 (D. C. W. D., N. Y. 1938).

[6] 307 U. S. 1 (1939).

[7] See *Fleming* v. *McCurtain*, 215 U. S. 56, 59 (1909).

[8] *Ibid.*, p. 60.

[9] 9 Op. A. G. 24, 26, 27 (1857).

[10] 82 C. Cls. 23 (1935), reversed on other grounds in 299 U. S. 476 (1937). It should be noted that the tribe sued infer *alia*, for the value of timber and hay unlawfully cut from tribal property and sold by members of the tribe. This contention was rejected by the court on the ground that the tribe was not damaged where the entire membership was permitted to utilize or sell tribal property.

[11] 28 C. Cls. 281 (1893), aff'd. sub nom. *Cherokee* Nation v. *Journeycake*, 155 U. S. 196 (1894).

[12] On the concept of Indian tribes as membership corporations, see Chapter 14, sec. 4.

[13] See Chapter 9, sec 5B.

[14] Act of August 2, 1882, 22 Stat. 181; Act of July 4, 1884, 23 Stat 69; Act of July 4, 1884, 23 Stat. 73; Act of June 1, 1886, 24 Stat. 73; Act of July 1, 1886, 24 Stat. 117; Act of July 6, 1886, 24 Stat. 124; Act of February 24, 1887, 24 Stat. 419; Act of March 2, 1887, 24 Stat 446. Act of February 18, 1888, 25 Stat. 35; Act of May 14, 1888, 25 stat. 140; Act of May 30, 1888, 25 Stat. 162; Act of January 16, 1889, 25 Stat. 647; Act of May 8, 1890, 26 Stat. 102; Act of June 21, 1890, 26 Stat. 170; Act of June 30, 1890, 26 Stat. 184; Act of September 26, 1890, 26 Stat. 485; Act of October 1, 1890, 26 Stat 632; Act of February 24, 1891, 26 stat. 783; Act of March 3, 1891, 26 Stat. 844; Act of July 6, 1892, 27 Stat. 83; Act of July 30, 1892, 27 Stat. 336; Act of February 20, 1893, 27 Stat. 465; Act of March 2, 1896, sec. 3, 29 Stat. 40; Act of March 18, 1896, sec. 2, 29 Stat. 69; Act of March 30, 1896, sec 2 29 Stat. 80, 81; Act of April 6, 1896, 29 Stat. 87; Act of January 29, 1897, 29 Stat. 502; Act of February 14, 1898, 30 Stat. 241; Act of March 30, 1898, 30 Stat. 347.

terms for damages to individual occupants injured by the granting of such rights-of-way.[15] Under such statutes, it has been said,

> Where one has a base fee, it has been held that he should receive the fullvalue of the land, as the interest of the grantor is too remote to be treated as property. The fee of the territory, of the Cherokee Nation is in the Nation, but the occupants of the land have so complete a right of enjoyment that, when a right of way is condemned, they are entitled to the compensation.[16]

Where Congress has provided for the sale of tribal lands, special provision. has frequently been made for the payment of damages to individual occupants.[17]

While the Indian occupant of tribal land has such an interest as will entitle him to compensation when a right-of-way is granted across the land he occupies, it has been held administratively that such payments made to individual Indian occupants cannot satisfy the tribal right to compensation.[18]

C. TRIBAL LANDS AND PUBLIC LANDS OF THE UNITED STATES

Although Indian tribal lands have been distinguished from public lands in various ways, there are certain situations in which tribal lands have been treated as public lands. For example it has been held that tribal lands, even though held by the tribe in fee, may be considered public lands of the United States for the purpose of erecting federal buildings thereon, at least where Congress has directed such action, or where the tribe itself has consented to the action.[19]

Again, it has been held that Indian lands are "public lands" within the meaning of a statute granting a right-of-way to a railroad company across "public lands," where the United States specifically undertakes to extinguish Indian title on the lands affected and where the statute is interpreted to cover Indian lands by the "Executive Department charged with the administration of the act." [20]

Likewise, it has been held that land acquired by the United States in trust for an Indian tribe is immune from state zoning regulations which, in terms, do not apply to lands "belonging to and occupied by the United States." [21]

As already noted, the fact that Indian lands may be classified as "public lands" for certain. purposes, does not negate their character, as tribal property. Thus, surplus Indian lands although denominated "public lands of the United States" for purposes of disposition, are subject to restoration as tribal lands under section 3 of the Act of June 18, 1934.[22]

And where "public lands" are granted to a state or railroad, Indian lands will not be deemed to. be covered by the grant in the absence of clear evidence of a congressional intent to include such lands.[23]

Similarly, it has been held that Indian tribal lands are not covered by statutes opening "public lands" to settlement,[24] nor are they comprised within the mineral laws affecting the public domain.[25]

D. THE COMPOSITION OF THE TRIBE AS PROPRIETOR

To mark out the tribe in which any form of tribal property is vested is ordinarily a simple enough matter. There are, however, a number of cases in which, because of tribal amalgamation or dissolution. modification of membership rules, or inconsistencies and ambiguities in treaty or statutory designations, serious questions arise as to the composition of the tribe in which particular rights of property are vested. Insofar as these questions involve the issue of the tribal status, they have already received our consideration in Chapter 14. For present purposes it is enough to designate briefly the chief complications that have arisen in designating the tribe in which given property rights are vested.

One of these complications arises out of the practice in numerous early statutes and treaties, of dividing a tribal estate between those Indians desiring to maintain tribal relationships and communal property and those desiring to separate themselves from the tribe and hold their shares of tribal property in individual ownership. Typical of this arrangement is the Act of February 6, 1871.[26] Under this statute the tribal estate was divided be-

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[15] Act of May 30, 1888. 25 Stat. 160; Act of June 4, 1888, 25 Stat. 167 ; Act of June 26, 1888. 25 Stat. 205 : Act of July 26, 1888, 25 Stat 347 ; Act of July 26. 1888. 25 Stat. 349: Act of October 17, 1888. 25 Stat. 558; Act of February 23, 1889, 25 Stat. 684 (Dakota): Act of February 26. 1889. 25 Stat. 745 (Kansas) ; Act of May 8. 1890, 26 Stat. 104 : Act of October 1, 1890, 26 Stat. 663 ; Act of December 21, 1893 28 Stat. 22; Act of August 4. 1894. 28 Stat. 229 ; Act of February 28. 1899. sec. 3, 30 Stat. 906; Act of March 2, 1899, sec. 3, 30 Stat. 990

[16] Randolph, Eminent Domain (1894), sec. 301. citing Payne v. *Kansas & A. Val. R. Co., 46* Fed. 546 (C. C. W. D. Ark.. 1891).

[17] Act of May 28, 1830, 4 Stat. 411 (providing that where tribal lands were exchanged for lands west of the Mississippi, by tribal consent. the individual members of the tribe shall be paid *the* value of improvements upon the land they occupy) ; Act of February 6, 1871, sec. 1, 16 Stat. 404 (ownership of improvements on land offered for sale to be "certified by the sachem and councillors of said [Stockbridge and Munsee] tribe") ; Act of March 3, 1885, 23 Stat. 351 (Sac and Fox) ; Act of February 20, 1895, 28 Stat. 677 (Southern Ute) ; Act of June 28, 1898, 30 Stat. 495 (Indian Territory).

[18] *Memo.* Sol. I. D., August 11, 1937..

[19] In a decision dated June 25. 1900, 6 Comp. Dec. 957, the Comptroller of the Treasury considered the question of the construction of a school on the Pipestone Indian reservation owned by the Yankton Sioux Tribe in fee simple. The Comptroller held that neither sec. 355 of the Revised Statutes, 33 U. S. C. 733, nor the general policy exemplified by that section against the expenditure of public funds on private property had any application, staring :

> • • • The same acts which make the appropriations for new buildings make large appropriations for the support of the school on the reservation, and as the funds provided for the support Of the school is a gift it may, with some show of reason. be contended that it was the intention of Congress that the provisions for new buildings should be considered as a gift. and that the money should be expended on the land known to belong to the Indian in fee. (P. 960.)

A subsequent decision dated February 23. 1918. 24 Comp. Dec. 477, subscribes to the same doctrine. There the Comptroller ruled that public moneys could not be expended in erecting school buildings on Indian reservation lands the title to which was in the State. But be said:

> If the legal title to the land upon which it is contemplate to erect the buildings were in the Seminole Indians, then it might not be improper to use Government appropriations for the construction of the required buildings. • • • (P. 479.)

[20] *Kindred v. Union Pacific R. R. Co., 225 U. S. 582, 596* (1912), aff'g. 168 Fed. 648 (C. C. A. 8. 1909). The doctrine of this case is stretched to cover a case where no administrative construction supported the decision and where the land had been promised to a given tribe of Indians "as their land and home forever" (Treaty of June 5 and 17, 1846. with the Pottowautomie, 9 Stat. 853, 854). in the case of *Nadeau* v. *Union* Pac. R. Co. 253 U. S. 422 (1920) (construing the Act of July 1. 1862. 12 Stat. 489. as amended by the Act of July 3. 1866. 14 Stat. 79). *Cf.*, however, *Leavenworth, etc., R. R. Co.,* v. *United States, 92* U. S. 733, 743 (1875). holding that a congressional grant of Indian lands is not to be presumed "in the absence of words of unmistakable import." Accord : Missouri, *Kans. & Tex. Ry. Co.* v. *United States, 235* U. S. *37* (1914) Cf. also *Beecher* v. *Wetherby,* 95 U. S. 517 (1877) (holding that a grant of "public lands" may convey the fee to an Indian reservation subject to the Indians' right of occupancy. if such congressional intention is shown). And see fns. 215, 217, *infra.*

[21] Memo. Sol. I. D., October 5, 1936.

[22] 48 Stat. 984. 25 U. S. C. 463 ; Op. Sol. I. D., M.29798, June 15, 1938.

[23] *Minnesota v. Hitchcock,* 185 U. S. 373 (1902). And see *Leavenworth, etc. R. R. Co. v. United States, 92* U. S. 733. 741 (1875). See *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114. 119 (1894) ; *Dubuque, etc., Railroad* v. *D. M. V. Railroad,* 109 U. S. 329. 334 (1883); but *cf. Shepard v. Northwestern Life Ins. Co., 40* Fed. 341, 348 (C. C. E. D. Mich., 1889). And cf. fn. 20. *supra.*

[24] *United States* v. *McIntire,* 101 F. 2d 650 (C. C. A. 9, 1939), rev'g. *McIntire* v. *United States,* 22 F. Supp. 316 (D. C. Mont. 1937).

[25] See secs. 7 and 14, *infra.*

[26] 16 Stat. 404 (Stockbridge and Munsee).

tween a "citizen party" and an "Indian party." the former to receive per capita shares of the tribal funds. and the latter to enjoy exclusive rights in the remaining tribal fund- Members of the "citizen party" were deemed to have made "full surrender and relinquishment" of all claims "to be thereafter known and considered as members of said tribe, or in any manner Interested in any provision heretofore or hereafter to be made by any treaty or law of the United States for the benefit of said tribes . . . ." (Sec. 6.)[27]

A similar procedure was employed in certain cases where tribes were induced to migrate westward and those individuals remainlog behind severed tribal connections and thus lost any rights in the tribal property of the migrant tribe.[28]

The problem of proportionate common ownership by two tribes is raised by the Act of March 2, 1889.[29]

A related problem is raised by the existence of separate treaty rights enjoyed by the Gros Ventre and the Assiniboine tribes of the Fort Belknap Reservation. which tribes, as a result of occupylog a single reservation,[30] holding land in common. and acting through a single tribal council. have come to be amalgamated as a single tribe.[31]

The pooling of lands held by different Chippewa bands under the Act of January 14, 1889,[32] has raised a number of complex questions which can hardly be noted within the confines of this discussion.[33] While it is impossible to lay down a simple rule to determine when title to reservation lands is located in a tribe and when It is located in a component band. the opinion of the Supreme Court in *Chippewa Indians* v. *United States* [34] indicates the factors that will be considered in such a determination. Among such factors particular importance attaches to the attitudes of other bands towards the claim of the band in occupancy, the nature of the treaties made. whether with individual bands or with the entire tribe or nation, and. the administrative practice of the Interior Department with respect to the use of lands and the disposition of proceeds therefrom.

The clarification of ambiguities in the designation of the Indian group for which a reservation has been set aside is exemplified in the case of the Colorado River Reservation. This reservation was originally set aside "for the Indians of the said river and its tributaries."[35] It was held by the Solicitor of the Interior Department that the Indians located on the reservation over a long period of years and recognized as a single tribe came to enjoy rights in the reservation which administrative officers could not thereafter diminish by locating, on the reservation. Indians of other tribes residing within the Colorado River watershed.[36]

[27] Accord : Act of February 20. 1895. 28 Stat. 677 (Ute).
[28] 17 Op. A. G. 410 (1882) (Miami tribe). See Chapter 3. secs. 3 and 4.
[29] 25 Stat. 1013.
[30] Act of May 1. 1888. 25 Stat. 113. 124.
[31] Memo. Sol. I. D.. March 20. 1936.
[32] 25 Stat. 642.
[33] For an account of these arrangements. see *United States* v. *Mille Lac Band of Chippewa Indians. 229* U. S. 498 (1913) ; *Chippewa Indians of Minnesota* v. United *States*, 301 U. S. 358 (1937). aff'g 80 C. Cls. 410 (1935) : *United States* v. *Minnesota*, 270 U. S. 181 (1928) ; Op. Sol. I. D., M.29616, February 19. 1938.
[34] *Supra*, fn. *33*. And *see Chippewa* Indians of *Minnesota* v. *United States*. 307 U. S. I (1939).
[35] Act of March 3. 1865. 13 Stat. 541. 559.
[36] Memo. Sol. I. D.. September 15. 1936 ; Memo. Sol. I. D. October 29. 1936. Accord: United *States* v. *Choctaw Nation*, 179 U. S. 494, 548 (1900).

SECTION 2. FORMS OF TRIBAL PROPERTY

In the whole range of ownership forms known to our legal system. from simple ownership of money or chattels and fee simple title in real estate, through the many varieties of restricted and conditioned titles, trust titles and future interests. to the shadowy rights of permittees and contingent remaindermen, there is probably no form of property right that has not been lodged in an Indian tribe. The term *tribal* property. therefore. does not designate a single and definite legal institution. but rather a broad range within which important variations exist. These variations occur in every aspect of property law—in the duration of the possessory right. whether perpetual or limited. in the extent of that right. with respect, e. *g.*, to timber. minerals, water, and improvements on tribal land. in the measure of Supervision which the Federal Government reserves over the tribal property. and in the types of use and disposition which may be made of the property by the tribal "owner." In view of these diversities. generalizations about "tribal property" should be scrutinized as critically as assertions about "property" in general.

A brief and incomplete list of the various tenure's by which tribal property in held may serve to indicate the need far caution in dealing with generalizations about "Indian title" and "tribal ownership" : (1) fee simple ownership of land ; [37] (2) equitable ownership of land: [38] (3) leasehold interest to land; [39] (4) rights of reverter established by statutes granting to various railroads rights-of-way across Indian reservations with a provision that the land shall revert to the tribe in the event that the grantee ceases to use it for the designated purpose,[40] and similar rights of reverter established by various other types of legislation ; [41] (5) easements ; [42] (6) ownership of minerals underlying allotted

[37] see sec 6 of this Chapter.
[38] See sec. 6 of this Chapter.
[39] see. for example, the Act of February 28, 1809. 2 Stat. 527. conferring a 50-year leasehold upon the Alibama and the Wyandott tribes. subject to termination Upon abandonment.
[40] Act of July 4. 1884. 23 Stat. 69; Act of July 4. 1884. 23 Stat. 73 : Act of June 1. 1886, 24 Stat. 73 : Act of July 1. 1886. 24 Stat. 117 : Act Of July 6. 1886. 24 Stat. 124 : Act of February 24. 1887. 24 Stat. 419 ; Act of March 2. 1887. 24 Stat. 446: Act of February 18. 1888. 25 Stat. 35 : Act of May 14. 1888. 25 Stat. 140 : Act of May 30. 1888. 25 Stat. 162 ; Act of June 26, 1888. *25* Stat 205 ; Act *of* September 1. 1888. 25 Stat. 452; Act of January 16. 1889. 25 Stat. 647 ; Act of February 26. 1889. 25 Stat. 745: Act of May 8. 1890. 26 Stat. 102: Act of June 21. 1890. 26 Stat. 170: Act of June 30. 1890. 26 Stat. 184; *Act of* September 26. 1890. 26 Stat. 485 ; Act of October 1. 1890. 26 Stat. 632: Act of February 24. 1891. 26 Stat. 783 ; Act of March 3. 1891. 26 Stat. 844 ; Act of July 6. 1892. 27 Stat 83: Act of July 30. 1892. 27 Stat. 336: Act of February 20. 1893. 27 Stat. 465 ; Act of December 21. 1893. 28 Stat. 22 : Act Of August 4. 1894. 28 Stat. 229 ; Act of March 2, 1896. 29 Stat. 40 : Act of March 18. 1896. 29 Stat. 69 ; Act of March 30. 1896. 29 Stat. 80. Act Of April 6. 1896. 29 Stat 87: Act of January 29. 1897. 29 Stat. 502: Act of February 14. 1898. 30 Stat 241 : Act of March 30. 1898. 30 Stat 347 : Act of February 28. 1899. 30 Stat 906.
[41] See. for example, *United States* v *Board of Nat. Missions of Presbyterian Church*. 37 F 2d 272 (C C A. 10. 1929). Compare sec. 2. paragraph 12. of the Act of June 28. 1906. 34 Stat. 539. providing for the conveyance of Osage lands to a cemetery association with a right of reverter to "the use and benefit of the individual members of the Osage tribe. according to the roll herein provided. or to their heirs."
[42] See. for example. the Act of May 9, 1924. 43 Stat. 117. providing that lands withdrawn from the Fort Hall Indian reservation for reservoir purposes shall be subject to a "reservation of an easement to the Fort Hall Indians to use the said lands for grazing, hunting. fishing. and gathering of wood, and so forth. the same way as obtained prior to this enactment. insofar as such uses shall not interfere with the use of said lands for reservoir purposes." Compare the Act of February 26. 1919. 40 Stat 1175. conferring upon the Havasupai tribe rights of "use and occupancy" in lands within the Grand Canyon National Park.

lands;[43] (7) water rights: [44] (6) rights of interment: [45] (9) tribal trust funds; [46] (10) accounts payable to tribe.[47]

Various other types of property rights [48] vested in Indian tribes might be noted, but the foregoing list should serve to convey a fair idea of the complexity of the subject matter and the danger of overgeneralization.

[43] Act of June 4. 1920, sec. 6, 41 Stat. 751, 753 (Crow); Act of June 28. 1898, sec. 11, 30 Stat. 495,. 497 (Indian Territory); Act of June 28. 1906. 34 Stat. 539 (Osage); Act of March 3, 1921, sec.. 4. 41 Stat. 1355 (Fort Belknap). See sec. 14, *infra*.

[44] See, for example. Act of June 6, 1900, 31 Stat 672 (Fort Hall; reserving -water rights' by agreement where surplus lands were sold on Fort Hall Reservation); Act of March 3, 1905. 33 Stat. 1016 (authorizing the use of tribal funds to purchase 'water rights for Indian lands on the Wind River Reservation in accordance with the statutes of Wyoming). And see sec. 16 of this Chapter.

[45] Act of March 1, 1883, 22 Stat. 432 (rights of interment reserved for Indians of 'Alleghany Indian Reservation when lands are transferred to cemetery association); Act of January 27, 1913. 37 Stat, 652 (Fort Bidwell Indian School Reservation).

[46] Act of June 8, 1858, sec. 2, 11 Stat. 312; Act of March 3, 1863. secs. 4, 5, 12 Stat. 819; Act of April 29, 1874, sec. 2, 18 Stat. 36, 41; Act Of March 3. 1881, sec. 4, 21 Stat. 380; Act of March 3, 1885, 23 Stat. 351 (Sac and Fox, and Iowa); Act of September 1, 1888, sec. 6, 25 Stat. 452; Act of February 20, 1893, 27 Stat. 469 (White Mountain Apache); Act of March 2, 1901. 31 Stat. 952;' Act of April 23. 1904, 33 Stat. 302 (Flathead); Act of December 21, 1904, 33 Stat. 595 (Yakima); Act of June 5, 1906, 34 Stat. 213; Act of February 10, 1912, 37 Stat. 64 (Blackfeet); Act of February 14. 1913, 37 Stat. 675 (Standing Rock); Act of March 3, 1925, 43 Stat. 1101. See sec. 22. *infra*.

[47] See, for example, Act of March 3, 1921. sec. 5. 41 Stat 1355.

[48] See, for example, Act of August 6. 1846, 9 Stat. 55 (claims); Joint Resolution of January 18, 1893, 27 Stat. 753: Act of February 13. 1913, 37 Stat. 668 (right of ferriage); Act of February 9, 1925, 43 Stat. 820 (claims).

SECTION 3. SOURCES OF TRIBAL RIGHTS IN REAL PROPERTY

The definition of tribal property rights in every decided case and in every actual situation involves some document or course of action which defines those rights. An analysis of the different ways in which tribal rights over property come into being is therefore prerequisite to a proper definition of those rights.

Interests in real property have been acquired by Indian tribes in at least six ways:

1. By aboriginal possession.
2. By treaty.
3. By act of Congress.
4. By Executive action.
5. By purchase.
6. By action of a colony, state, or foreign nation.

In sections 4 to 9 of this chapter, these six sources of tribal right will be analyzed.

A word of caution, however, must be offered against the assumption that the foregoing six methods are clearly distinguished from each other. In fact, there is an interconnection of all methods: aboriginal possession may be confirmed by treaty or statute; a treaty may carry out objectives laid down in a statute, and vice versa; either may be implemented by Executive order or purchase. Action of the United States along any of these lines may parallel or confirm acts of prior sovereignties. But with all these qualifications, the six-fold division above proposed does offer a convenient method of arranging in workable compass the material pertaining to the creation of tribal property rights in laud.

By way of corrective to any illusion of certainty that this division of material may stimulate, it is well to quote the words of the Supreme Court in *Minnesota* v. *Hitchcock*.[49]

> * * * Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. * * *

[49] 185 U. s. 373, 389–390 (1902).

SECTION 4. ABORIGINAL POSSESSION

The derivation of Indian property rights from aboriginal possession [50] is not only the first source of tribal property rights in a historical sense, but is of first importance in that this source of property has greatly influenced tribal tenures established in other ways. Except in the light of this influence, it is difficult to understand why peculiar incidents should attach to property which has been purchased outright by an Indian tribe from a private person, or has been patented to the tribe by the United States in the same way that other public lands are patented to private individuals. That there are peculiar incidents attached even to fee-simple tenure by an Indian tribe is an undoubted fact, and the explanation of this fact is probably to. be found in the contagion that has emanated from the concept of aboriginal possession.

The problem of recognizing or denying possessory rights claimed by the aborigines in the soil of America engaged the attention of jurists and publicists from the discovery of America. A clear expression of the classical view, which influenced Chief Justice Marshall and other founders of American legal doctrine in this field, was given by Vattel.[51] The conflicting claims of European powers to unpopulated areas in the new world were to be resolved, according to Vattel, in accordance with the precept of natural law (or, as we should say today, the precept of international morality) that no nations can

> * * * exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. * * * We do not, therefore, deviate from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession. This laudable example was followed by William Penn, and the colony of quakers that he conducted to Pennsylvania.

The basic issues in the field of aboriginal possessory right were first presented to the United States Supreme Court in the case of *Johnson v. McIntosh*.[52] Of the opinion of Chief Justice Marshall in that ease, a leading writer on American consti-

[50] The significance of this concept is summarized in these words from the opinion in *Deere* v. *State of New Pork*, 22 F. 2d 851. 854 (D. C. N. D. N. Y., 1927):

> * * * The source of title here is not letters patent or other form of grant by the federal 'government. Here the Indians claim immemorial rights, arising prior to white occupation, and recognized and protected by treaties between Great Britain and the United States and between the United States and the Indians. By the treaty of 1784 between the United States and the Six Nations of Indians, and the treaty of 1796 between the United States. the state of *New* York and the Seven Nations of Canada. the right of occupation of the lands in question by the St. Regis Indians, was not granted. but recognized and confirmed.

[51] Vattel's *Law* of Nations (1733). Book I, c. XVIII. The passage quoted is from the edition of Chitty published in 1839.

[52] 8 Wheat. 543 (1823).

tutional law remarks : "the principles there laid down have ever since been accepted as correct."[53] In this case the plaintiffs Claimed land under a grant by the chiefs of the Illinois and Piankeshaw Nations, and in the words of the opinion, "the question is, whether this title can be recognized in the courts of the United States?" In reaching the conclusion that the Indian tribes did not enjoy and could not convey complete title to the soil, the Court analyzed in some detail the extent and origin of the Indians' possessory right. From this opinion the' following pertinent excerpts are taken :

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of It as they could respectively acquire. Its vast extent offered an ample Held to the ambition and enterprise of all; and 'the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements. and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right' of acquisition. which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made. against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans. necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives. and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves. and to the assertion of which. by others. all assented.
>
> Those relations which were to exist between the discoverer and the natives. were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations. the rights of the original inhabitants were. in no instance, entirety disregarded: but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished. and their power to dispose of the soil at their own will, to whomsoever they pleased. was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants. they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion. a power to grant the soil, while yet in possession of the natives. These grants have been understood by all. to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America. from its discovery to the present day, proves, we think, the universal recognition of these principles. (Pp. 572-574.)
>
> * * * * *
>
> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves. the title by which it was acquired. They maintain, as all others have maintained, that. discovery gave an exclusive right to extinguish the Indian title of occupancy. either by purchase or by conquest: and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.
>
> The power now possessed by the government of the United States to grant lands. resided. white we were colonies. in the Crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.
>
> We will not enter into the controversy, whether agriculturists, merchants, add manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title. or to sustain one which is incompatible with it. (Pp. 587-589.)
>
> * * * * *
>
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained ; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land. and cannot he questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants. to be protected, indeed, while in peace. in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason. and certainly cannot be rejected by courts of justice. (Pp. 591-592.)

The limitations upon Indian rights emphasized by Chief Justice Marshall in his opinion in the *McIntosh* case were supplemented a few years later by a second notable opinion of the Chief Justice emphasizing the positive content of the Indian possessory right. In the case of *Worcester* v. *Georgia*,[54] which dealt with the constitutionality of action by the State of Georgia leading to the imprisonment of individuals admitted to residence in the Cherokee Reservation by the authorities of that nation and by the United States. the Supreme Court took occasion again to analyze in detail the extent of the Indian right in the soil of the Cherokee Nation. "It is difficult" the Chief Justice ironically noted

> * * * to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied: or that the discovery of either by the other should give the discoverer rights in the country discovered. which annuled the Pre-existing rights of its ancient possessors.
>
> * * * *

[53] C. K. Burdick, The Law of the American Constitution, Its Origin sod Development (1922) sec. 107.

[54] 6 Pet. 515 (1832).

> But power, war, conquest, give rights which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. (P. 543.)

"The great maritime powers of Europe," the Chief Justice observed, agreed upon the mutually advantageous rule, formulated in the *McIntosh* case "'that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.' 8 Wheat 573." (Pp. *543-4.)*

Such a rule, however, bound the European governments, but not the Indian tribes.

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It, was an exclusive. principle which shut out the right of competition among those who had agreed to' it; not one which could annul the previous rights of those who- had not agreed to it. It 'regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.
>
> The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all- the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.
>
> Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, -according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood. (Pp. 544-545.)

Viewing the problem in these terms, the Supreme Court had no difficulty in reaching the conclusion that a possessory right in the area concerned was vested in the Cherokee Nation and that the State of Georgia had no authority to enter upon the Cherokee lands without the consent of the Cherokee Nation.

These views were reaffirmed by the Supreme Court, per Clifford, *J.*, in the subsequent ease of *Holden* v. *Joy*.[55]

> Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man, Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and' the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.*
>
> **Mitchel et pt.* v. *United States, 9* Peters, 748.

A similar view of the aboriginal Indian title was taken by the Attorney General in answering the question whether a certain Mr. Ogden, owner of the reversionary fee in Seneca Indian lands, might lawfully enter these lands for the purpose of making a survey. In answering this, question in the negative, Attorney General Wirt declared :

> The answer to this question depends on the character of the title which the Indians retain in these lands. The practical admission of the European. conquerors of this country renders it' unnecessary for us to speculate on the extent of that. right which they might have asserted from conquest, and from the migratory' habits and hunter state of its aboriginal occupants. (See the -authorities cited in Fletcher and Peck, 6 Cranch, 121.) The conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe which shall have removed voluntarily, or become extinguished by death. So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive ; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. * * * Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States: their title is original, sovereign, and exclusive. We treat with them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince.
>
> It is said that the act of ownership proposed to be exercised by the grantees under the State of Massachusetts will not injure the Indians, nor disturb them in the usual enjoyment of these lands; but of this the Indians, whose title, while it continues, is sovereign and exclusive, are the proper and the only judges. * * *
>
> I am of opinion that it is inconsistent, both with the character of the Indian title and the stipulations of their treaty, to enter upon these lands, for the purpose of making the proposed surveys, without 'the consent of the Indians, *freely rendered; and on a full understanding of the case.*[56] (Pp. 466–467.)

Cases andopinions subsequent to the *McIntosh* case oscillate between a stress on the content of the Indian possessory right and stress on the limitations of that right. These opinions and cases might perhaps be classified according to whether they refer to the Indian right of occupancy as a "mere" right of occupancy or as a "sacred" right of occupancy: All the cases, however, agree in saying that the aboriginal Indian title involves an exclusive right of occupancy and does not involve an ultimate fee. The cases dealing with Indian lands in the territory of the original colonies locate-the ultimate fee in the state wherein the lands are situated.[57] Outside of the territory of the original

[55] 84 U. S. 211, 244 (1872). Accord ; 1 Op. A. G. 465 (1821).

[56] The Seneca Lands, 1 Op. A. G. 465 (1821).

[57] *Clark* v. *Smith,* 13 Pet. 195 (1839) ; *Lattimer v. Poteet,* 14 Pet. 4 (1840) ; *Seneca Nation* v. *Christy,* 162 U. S. 283 (1896) ; The Cherokees and their Lands, 2 Op. A. G. 321 (1830) (holding that Cherokee lands became the property of Georgia upon the migration of the occupants) ; Tennessee Land Titles, 30 Op. A. G. 284 (1914) (holding that such lands within the boundaries of the State of Tennessee became the property of that state upon the-migration of the Cherokees) ; *Spalding* v. *Chandler,* 160 U. S. 394 (1896), and see *Fletcher* v. *Peck, 6* Cranch 87 (1810) ; *Johnson* v. *McIntosh,* 8 Wheat. 543, 590 (1823) ; *Cherokee Nation* v. *Georgia,* 5 *Pet.* 1, 38 (1831) ; *United States* v. *Joseph, 94* U. S. 614, 618 (1876), aff'g. 1 N. M. 593 (1894) ; 5 L. D. Memo. 236 (New York Indians).

colonies, the ultimate fee is located in the United States and may be granted to individuals subject to the Indian right of occupancy.[58]

The question of what evidenciary facts must be shown to establish the aboriginal possession described in the foregoing opinions would carry us beyond the limits of this volume, but certain elementary principles are readily established. It has been held that title by aboriginal possession is not established by proof that an area was used for hunting purposes where other tribes also hunted on the lands in question.[59]

Where exclusive occupancy over a considerable period is shown, rights of possession are not lost by forced abandonment.[60] In the words of the Court of Claims,

> The Supreme Court has-repeatedly held that the Indians' claim of right of occupancy of lands is dependent upon actual and not constructive possession. *Mitchel* v. *United States, 9* Pet. 711; *Williams v. Chicago*, 242 U. S. 434.; *Choctaw Nation* v. *United States, 34 C.* Cls. *17.* Beyond doubt, abandonment of claimed Indian territory by the Indians will extinguish Indian title. In this case the Government interposes the defense of abandonment, asserting that the facts sustain the contention. It is of course conceded. that the issue of abandonment is one of intention to relinquish, surrender, and unreservedly give up all claims to title to the lands described in the treaty, and the source from which to arrive at such an intention is the facts and circumstances of the transaction involved. Forcible ejection from the premises. or nonuser under certain circumstances, as well as lapse of time, are not standing alone sufficient to warrant an abandonment. *Welsh* v. *Taylor*, 18 L. R. A. 535; *Gassert* v. *Noyes*. 44 Pacific 959; *Mitchell v. Corder*, 21 W. Va. 277. (P. 334.)

[58] *Missouri* v. Iowa, 7 How. 660 (1849); Pottage *City* Case, 8 Op. A. G. 255 (1856). *Cf. Act* of June 7, 1836, 5 Stat. 34 (granting state jurisdiction over given territory, to take effect 'when Indian title to the country was extinguished).

[59] *Assiniboine Indian Tribe v. United States, 77 C. Cls. 347 (1933).* app. dism. 292 U. S. 606.

[60] *Fort Berthold Indians v. United States, 71 C.* Cls. 308 *(1930).*

SECTION 5. TREATY RESERVATIONS

The various ways in which treaty reservations have been established and the different forms of language used in defining the tenure by which such reservations are held, together with the Judicial and administrative interpretations placed upon these phrases, have been noted in some detail in Chapter 3. and need not be restated here. It is enough for our present purposes merely to list (a) the principal ways in which treaty reservations have been established : (*b*) the principal forms of language used in defining tribal tenure ; and (c) the more important rules of interpretation placed upon such phraseology.

A. METHODS OF ESTABLISHING TREATY RESERVATIONS

In general. three methods of establishing tribal ownership of lands by treaty were in common use: (1) the recognition of aboriginal title; (2) the exchange of lands; and (3) the purchase of lands.

(1) Usually the first treaty made by the United States with a given tribe recognizes the aboriginal possession of the tribe and defines its geographical extent. When this geographical extent has been defined by treaty with another sovereign. the treaty with the United States may simply confirm such prior definition. Thus, the first published Indian treaty, that of September 17, 1778, with the Delaware Nation,[61] provides:

> Whereas the enemies of the United States have endeavoured, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid. to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares. and their heirs, all their territorial rights in the fullest and most ample manner. as it hath been bounded by former treaties,[62] as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.

A typical treaty fixed a "boundary line between the United States and the Wiandot and Delaware nations."[63]

In many treaties the recognition of aboriginal title was coupled. with a cession of portions of the aboriginal domain.[64] Thus, Article 6 of the Treaty of January 31, 1786, with the Shawanoe Nation[65] provides :

> The United States do allot to the Shawanoe nation, lands within their territory to live and hunt upon, beginning at * * *. beyond which lines none of the citizens of the United Stales shall settle. nor disturb the Shawanoes in their settlement and possessions; and the Shawanoes do relinquish to the United States. all title. or pretence of title, they ever had to the lands east, west, and south, of the east. west and south lines before described.

In some of these treaties the tribe was given a right at a future date to select from the ceded portions additional land for reservation purposes.[66]

(2) A second method of establishing tribal land ownership by treaty was through the exchange of lands held in aboriginal possession for other lands which the United States presumed to grant to the tribe.[67] A typical treaty of this type is that of

[61] Art 6, 7 stat. 13.

[62] The "former treaties" referred to in this article were treaties With the British Crown and with the Colonies. A similar reference is made to the Treaty of December 17, 1801. with the Chactaw Nation. Art. 3. 7 Stat. 66. ("The two contracting parties covenant and agree that the old tine of demarkation heretofore established by and between the officers of his Britannic Majesty and the Chactaw nation . . . shall be retraced and plainly marked. . * . and that *the* said line shall be the boundary between the settlements of the Mississippi Territory and the Choctaw nation.")

[63] Art 3 of Treaty of January 21. 1785. with the Wiandot, Delaware Chippawa. and Ottawa Nations. 7 Stat. 16. Art. 3 of Treaty of January 1. 1786. with the Choctaw Nation. 7 Stat. 21. ("The boundary of the lands hereby allotted to the Choctaw nation to live and hunt on . . . is and shall be the following . . *") : Art. 4 of Treaty of August 7. 1790. with the Creek Nation. 7 Stat. 35. ("The boundary between the citizens of the United States and the Creek Nation is. and shall be. . . ● .")

[64] Treaty of August 3. 1795. with the Wyandots. Delawares. Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel River. Weea's, Kickapoos, Piankashaws, and Kaskaskias. 7 Stat. 49 ; Treaty of May 31. 1796. with the Seven Nations of Canada. 7 Stat. 55: cf. Treaty of July 2. 1791. with the Cherokee Nation. 7 Stat. 39. 40: ("The United States solemnly guarantee to the Cherokee nation all their lands not hereby ceded.") ; Treaty of October 17. 1802. with the Choctaw Nation. 7 Stat. 73; Treaty of December 30. 1805. with the Piankishaw Tribe. 7 Stat. 100: Treaty of November 17. 1807. with the Ottoway, Chippeway. Wyandotte and Pottawatamie Nations. 7 Stat. 105; Treaty of August 24. 1818. with the Quapaw Tribe 7 Stat. 176 : Treaty of September 24. 1819. with the Chippewa Nation. 7 Star 203: Treaty of September 18. 1823. with the Florida Tribes, 7 Stat. 224 ; Treaty of June 2. 1825. with the Great and Little Osage Tribes. 7 Stat. 240: Treaty of June 3. 1825. with the Kansas Nation. 7 Stat. 244; Treaty of October 23. 1826. with the Miami Tribe. 7 Stat. 300.

[65] 7 Stat. 26. 27.

[66] Treaty of August 13. 1803. with the Kaskaskia Nation. 7 Stat. 78.

[67] Treaty of September 29. 1817. with the Wyandot. Seneca. Delaware. Shawanese, Potawatomees, Ottawas. and Chippeway Tribes. 7 Stat. 160 ;

October 3, 1818, with the Delaware Nation.[68] The first two articles of this treaty provided:

> ART. 1. The 'Delaware nation of Indians cede to the United States all their claim to land in the state of Indiana;
>
> ART. 2. In consideration. of the aforesaid cession. the United States agree to provide for the Delawares a country to reside in, upon the west side of the Mississippi, and to guaranty to them the peaceable possession of the same.

This type of exchange is characteristic of the "removal" treaties whereby many of the eastern and central tribes were induced to move westward.[69]

Another type of treaty wherein an aboriginal domain is ceded to the United States in exchange for other lands arises where a particular tribe combines with another and cedes to the United States its land in exchange for the privilege of participating in the reservation privileges accorded the other tribe.[70] Yet another variation combines the two foregoing basic methods. A typical of this type is that of July 8, 1817, with the Cherokee Nation,[71] wherein it Was provided that a portion of the aboriginal lands be ceded in exchange for lands west of the Mississippi but that a portion be retained for those Indians not desirous of migrating west.[72]

(3) A third type of treaty provision for the establishing of reservations, frequently connected with the above two methods, directed the purchase of lands on behalf of the tribe. Generally tribal funds were utilized for such purchase and the purchase was made either from the United States or from another tribe. A typical provision of this type is the following, taken from the Treaty of March 21, 1866, with the Seminoles :

> • * * The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, • * *. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the Price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the -United States for Seminole lands under the stipulations above written.[73]

B. TREATY DEFINITIONS OF TRIBAL PROPERTY RIGHTS

The language used to define the character of the estate guaranteed to an Indian tribe varies so considerably that any detailed classification is likely to be nearly useless. It is possible, however. to distinguish five general types of language commonly utilized.,

(1) In a number of treaties the United States undertakes to grant to the tribe concerned a patent in fee simple.[74] In some cases reference is made to the tribe "and their descendants."[75] In a few cases the terms "patent" and "fee simple" are coupled with language indicating that if the tribe ceases to exist as an entity the land will revert or escheat to the United States" In some cases express provision is made restricting alienation.[77] Occasionally the language of the ordinary patent or deed in fee simple is embellished with guarantees stressing the permanent character of the tenure, as in, the following language, taken from the Treaty of May 6, 1828, with the Cherokee Nation :[78]

> * * * a *permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever-a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *.

(2) Other treaties guaranteed ownership or possession, or permanent possession, without using the technical language of the typical patent or grant in fee simple.[79] Thus, for instance,

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Treaty of July 30, 1819, and July 19, 1820, with the Kickapoo Tribe, 7 Stat. 200, 208; Treaty of November 7, 1825. with the Shawanee Nation, 7 Stat. 284; Treaty of September 27, 1830, with the Choctaw Nation 7 Stat 333 ; Treaty of February 28, 1831, with the Seneca Tribe, 7 Stat. 348 ; Treaty of July 20, 1831. with the Mixed Band of Seneca and Shawnee Indians, 7 Stat. 351; Treaty of August 8, 1831, with the Shawnee Tribe, 7 Stat. 355; Treaty of August 30, 1831. with the Ottoway Indians. 7 Stat. 359; Treaty of September 15, 1832, with the Winnebago Nation, 7 Stat. 370 : Treaty of October 24, 1832, with the Kickapoo Tribe, 7 Stat. 391: Treaty of November 6, 1838, with the Miami Tribe, 7 Stat. 569; Treaty of October 11, 1842, with the Confederated Tribes of Sac and Fox, 7 Stat. 596 ; Treaty of March 17, 1842, with the Wyandott Nation, 11 Stat. 581.

[68] 7 stat 188.

[69] See Chapter 3, sec. 4E.

[70] Treaty of September 25, 1818. with the Peoria. Kaskaskia, Mitchigamia, Cahokia and Tamarois Tribes of the Illinois Nation 7 Stat. 181 ; Treaty of November 15, 1824, with the Quapaw Nation, 7 Stat. 232.

[71] 7 stat 156.

[72] Treaty of January 24, 1826. with the Creek Nation, 7 Stat. 286. See also Treaty of October 18. 1820, with the Choctaw Nation, 7 Stat. 210 ("Whereas it is an important object with the President of the United States, to-promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging. for a small part of their land here. a country beyond the Mississippi River. where all, who live by hunting and will not work, may be collected and settled together. • • ● ").

[73] Art 3, 14 Stat. 755. See also Treaty of December 29. 1835. with the Cherokee Tribe, 7 Stat. 478. 480 ("* • * the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians • • • the following additional tract of land").

[74] Treaty of March 17, 1842. with the Wyandott Nation, 11 Stat. 581 ("both of these cessions to be made in fee simple to the Wyandotts, and to their heirs forever"). And see Chapter 3. sec. 4

[75] Treaty of December 29. 1835. with the Cherokee Tribe. 7 Stat. 478 ("the United States • • • hereby covenant and agree to convey to the said Indians, and their descendants by patent. in fee simple * * *").

[76] Treaty of September 20. 1816. with the Chickasaw Nation, 7 Stat. 150; Treaty of September 27, 1830. with the Choctaw Nation. 7 Stat. 333 ("in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it") ; Treaty of February 28, 1831. with the Seneca Tribe. 7 Stat. 348; Treaty of July 20, 1831. with the Mixed Band of Seneca and Shawnee Indians. 7 Stat. 351; Treaty of August 8. 1831; with the Shawnee Tribe. 7 Stat. 355 : Treaty of August 30, 1831. with the Ottoway Indians, 7 Stat 359 ; Treaty of February 14, 1833, with the Creek Nation, Art. 3, 7 Stat. 417 ("The United States will grant a patent, in fee simple. to the Creek nation of Indians * • *, and the right thus guarranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them").

[77] Treaty of December 29, 1832. with the United Nation of Senecas and Shawnee Indians, 7 Stat. 411; 412 ("The said patents shall be granted in fee simple ; but the lands shall not be sold or ceded without the consent of the United States") ; *cf.* Treaty of July 30, 1819, and July 19, 1820, with the Kickapoo Tribe, 7 Stat. 200. 208 ("to them. and their heirs forever * * *. *Provided, nevertheless,* That the said tribe shall never sell the said land without the-consent of the President of the United States").

[78] 7 Stat. 311.

[79] Treaty of September 24, 1829. with the Delaware Indians. 7 Stat. 327 ("And the United States hereby pledges the faith of the government to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same. against the claims and assaults of ail and every other people whatever.") ; Treaty of October 11. 1842, with the Confederated Tribes of Sac and Fox, 7 Stat. 596 ("to the Sacs and Foxes for a permanent and perpetual residence for them and their descendants • • ● ") ; Treaty of August 3. 1795. with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas. Putawatimes, Miamls, Eel-river, Weea's, Kickapoos, Piankashaws. and Kaskaskias, 7 Stat 49, 52 ('The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please * * *") ; Treaty of October 24, 1832. with the Kickapoo Tribe, 7 Stat. 391 ("and secured by the United States. to the said Kickapoo tribe, as their permanent residence").

Article 4 of the Treaty of August 18. 1804. with the Delaware Nation [80] recognized the Delawares "as the rightful owners of all the country which is bounded * * *."[81]

(3) Various other treaties used language which if literally construed restricts' the Indian possession to a particular form of land utilization, but which may be construed as an outright grant in nontechnical language. Phraseology of this sort was analyzed by Marshall, C. J., in *Worcester* v. Georgia.[82] where he noted that the use of the term "hunting grounds" in describing the country guaranteed to the Cherokees did not mean that the land could not be used for the establishment of villages or the planting of cornfields.

(4) Particularly in the later treaties, phrases such as "use and occupancy" are increasingly utilized.[83]

(5) Finally, a number of treaties dodge the problem of defining the Indian estate by providing that specified lands shall be held "as Indian lands are held,"[84] or as an Indian reservation,[85] thus ignoring the fact that considerable differences may exist with respect to the tenures by which various tribes hold their land.

C. PRINCIPLES OF TREATY INTERPRETATION

Apart from general principles of treaty interpretation discussed in Chapter 3, certain holdings with respect to the interpretation of- treaty provisions establishing tribal land ownership deserve special note at this point.

(1) By way of caution against the notion that all Indian treaty reservations are held under a single form of ownership, one may note the comment of the Court of Claims in the case of *Crow Nation v. United States.*[86]

> * * * the title derived by an Indian tribe, through the setting apart of a reservation, depends entirely upon the terms of the treaty which is entered into between the parties, and that, where there is simply a reservation set apart for the Indian Nation, no fee simple or base fee is granted to the tribe, but only a right of occupancy.

(2) The question whether a treaty incorporates a grant *in praesenti*, or an executory promise, was considered in the case of the *New York Indians* v. *United States.*[87] Although the treaty used the words "agreed to set apart," the court held that the context and circumstances showed that the treaty was understood to effectuate a grant in *praesenti.*[88]

(3) It has been held that the mere use of the term "grant" in Indian treaties does not indicate an intent to establish fee simple tenure.[89]

(4) Likewise, it has been held that the language of a "grant" does not necessarily evidence a desire to grant new property rights but may constitute simply a method of defining and reserving aboriginal rights.[90]

(5) Where the United States has made a treaty promise that certain land "shall be confirmed by patent to the said Christian Indians, subject to such restrictions as Congress may provide," [91] and Congress has not provided any restrictions, the tribe is entitled to receive an ordinary patent granting title in fee simple, rather than "the usual Indian title." [92]

Other questions of the interpretation of treaty clauses are considered in later portions of this chapter, particularly in sections 12 to 16, and in Chapter 3, section 2.

It is doubtful whether any broad principles of interpretation that would be at all useful can be derived from the cases in this field, but in subsequent sections of this chapter we shall be concerned to analyze specific questions concerning the nature of the estate granted by the various phrases classified in the foregoing sections.

[80] 7 Stat. 81.

[81] See Treaty of January 7. 1806. with the Cherokee Nation. 7 Stat. 101. 103 ("and will secure to the Cherokees the title to the said reservations").

[82] 6 Pet. 515. 553 (1832).

[83] Treaty of May 31. 1796, with the Seven Nations of Canada. 7 Stat. 55 ("to be applied to the use of the Indians of . . . St. Regis") : *cf.* Treaty of January 9. 1789. with the Wiandot. Delaware, Ottawa, Chippewa, Pattawattima, and Sac Nations. 7 Stat. 28. 19 ("to live and hunt upon, and otherwise to occupy as they shall see fit")

[84] Treaty of May 12. 1854. with the Menomonees. 10 Stat. 1064. Cf. Art. 2. Treaty of September 26. 1833. with the United Nation of Chippewas, Potawatamies and Ottowas, 7 Stat. 431.

[85] Treaty of October 2. 1818, with the Wea Tribe, 7 Stat. 186 ("to be holden by the said tribe as Indian reservations are usually held"). Cf. Treaty of September 17, 1818, with the Wyandot, Seneca. Shawnese, and Ottawa Tribes. 7 Stat. 178 ("and held by then) in the same manner as Indian reservations hove been heretofore held. But [it] is further agreed. that the tracts thus reserved shall be reserved for the use of the Indians named . . . and held by them and their heirs forever, unless ceded to the United States.") : Treaty of September 29 1817. with the Wyandot, Seneca. Delaware. Shawanese, Potawatomees. Ottawas and Chippeway Tribes. 7 Stat. 160 ("grant. by patent. to the chiefs . . . for the use of the said tribe. . * . which tracts. thus granted, shall be held by the said tribe; upon the usual conditions of Indian reservations. as though no patent were issued.")

[86] 81 C. Cls. 238, 275 (1935).

[87] 170 U. S. 1 (1898) : followed in *United* States v. *New York Indians,* 173 U. S. 464 (1899).

[88] Treaty of January 15. 1838. with New York Indians. 7 Stat. 550. *See also Godfrey v. Beardsley,* 10 Fed. Cas. No. 5497 (C. C. Ind. 1841). holding that a treaty can operate as a grant of title to *lands.* Accord: *Jones* v. *Meehan,* 175 U. S. 1 (1899).

[89] Title of the Brothertowns under the Menominie Treaty. 3 Op. A. G. 322 (1838) ("the Indian tribes. under the policy of this government, in their natural capacity, cannot hold the absolute title to lands occupied by them. except when specially provided for by treaty; . . *") ; *Goodfellow* v. *Muckey,* 10 Fed. Cas. No. 5537 (C. C. Kans. 1881), holding that unless there is a clear and explicit provision in the treaty showing that the Government intended to make the grant in fee simple the court will presume that the treaty granted but a right of occupancy to the Indians.

[90] See *united States* v. *Romaine,* 255 Fed. 253, 260 (C. C. A. 9, 1919) (interpreting Treaty of January 22. 1855. with various tribes of Oregon Territory. 12 Stat. 927) : *Gaines* v. *Nicholson,* 9 How. 356, 364 (1850) ; *United States* v. *Winans,* 198 U. S. 371 (1905), rev'g. 73 Fed. 72 (C. C. Wash. 1898) .

[91] Treaty of May 6. 1854, with the Delaware Indians, 10 Stat. 1048.

[92] 9 Op. A. C. 24 (1857).

SECTION 6. STATUTORY RESERVATIONS

Sporadically during the treaty-making period and regularly since its expiration, tribal property rights in land have been established by specific acts of Congress. These acts vary from specific grants of fee simple rights to broad designations that a given area shall be used for the benefit of Indians, or that Indian occupancy of designated areas shall be respected by third parties. Legislation establishing Indian reservations follows various patterns.

(1) Perhaps the most common type of such legislation today is that which *reserves* a portion of the public domain from entry or sale and dedicates the reserved area to Indian use. The designated area is "set aside" or "reserved" for a given tribe, band, or group of Indians.[93] Frequently the statute uses the

[93] *E. g.,* Act of March 3. 183. 12 Stat. 819 ("assign to and Set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians") ; Act of May 21, 1926. 44 Stat. 614 (Makah ad Quileute Indians) ; Act of March 3. 1928. 45 Stat. 162 (Indians of Indian Ranch, Inyo County. California).