Committing injuries against Indians ; (3) trespassers settling on' Indian lands; (4) trespassers driving livestock upon Indian lands ; and (5) trespassers hunting or trapping game on Indian lands.

Section 3 of the first Indian Intercourse Act,[193] approved by President Washington on July 22, 1790. provided for the punishment of, any person found in the Indian country "with such merchandise in his possession as are usually vended to the Indians. without a license first had and obtained." and this provision. with minor modifications,[194] remains the law to this day. Section 5 of the same act[195] contained a further provision making it an offense for any inhabitant of the United States to "go into any town, settlement, or territory belonging to any nation or tribe of Indians, and . * * there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state-or district." This provision was likewise incorporated with minor modifications in subsequent statutes.[196]

The first Indian Intercourse Act was temporary, to continue "in force for the term of two years, and from thence to the end of the next session of Congress, and no longer." [197]

The second Intercourse Act, that of March 1, 1793,[198] introduced a new provision of importance. Section 5 of that act provided:

> *And be it further enacted,* That if any such citizen or inhabitant shall make a settlement on lands belonging; to any Indian tribe, or shall survey such lands, or desiguate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding; one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon. (P. 330.)

The reference to "lands belonging to any Indian tribe" was amplified in later legislation to refer to "lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe".[199] Various other minor modifications are found in the language of this provision, but in essence it sets forth the present-day law on the subject..

The second Indian Intercourse Act, like the first, was a temporary act, to continue "in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer." [200]

The Third Indian Intercourse Act, that of May 19, 1796,[201] dealt for the first time with two new kinds of trespasser, the hunter and the ranger. Section 2 of that act provided:

> *And be it further enacted,* That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary' line, to hunt, or in any wise destroy the game; or shall drive; or otherwise convey any stock of horses or cattle to range, on -any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

These provisions, reaffirmed and made permanent in the second section of the fifth Indian Intercourse Act,[202] were subsequently separated and elaborated in the Act of June 30, 1834,[203] which was a comprehensive statute on Indian relations:

> SEC. 8. *And be it further enacted.* That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken. (P. 730.)
>
> SEC. *9. And be it further enacted,* That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock. (P. 730.)

The last of these provisions, which is still in force,[204] has been interpreted to cover only the case where cattle are "driven" to the reservation, or to the vicinity of the reservation.[205] It has been held that sheep are "cattle" within the meaning of this section.[206]

Following the 1834 act, Congress provided for the protection of Indian lands against trespass in various other statutes. Thus, the Act of July 20, 1867,[207] entitled "An Act to establish Peace with certain Hostile Indian Tribes" provided that "all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations" should be offered reservations. The In-

[193] Act of July 22, 1790, 1 Stat. 137.

[194] Act of March 1. 1793. 1 Stat. 329 ("without lawful license") ; Acts of May 19. 1796, 1 Stat. 469 ; March 3, 1799, 1 Stat. 743 ; March 30. 1802. 2 Stat. 139; ("That no such citizen. or other person, shall be permitted to reside at any of the towns. or hunting camps of any of the Indian tribes as a trader without a license") ; Act of June 30, 1834, 4 Stat. 729 ('That any person other than an Indian who shall attempt to reside in the Indian country as a trader. or to introduce goods. or to trade therein without such license, shall forfeit . . *") ; Act of July 31, 1882. 22 Stat. 179; R. 8. § 2133 ; 25 U. S. C. 264 ("Any person other than an Indian of the full blood who shall attempt to reside in the Indian country. or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit . * . *Provided,* That this section shall not apply to any person residing among or trading with . . . the five civilized tribes, residing in said Indian country, and belonging to the Union *Agency* therein").

[195] Act of July 22, 1790. 1 Stat. 137, 138. See Chapter 1, sec. 2.

[196] Act of March 1, 1793, 1 Stat. 329 ("and shall there commit murder, robbery. larceny. trespass or other crime, against the person or property of any friendly Indian or Indians") ; *Act* of May 19, 1796. 1 Stat. 469. and Acts of March 3. 1799. 1 Stat. 743 ; March 30. 1802. 2 Stat. 139) ("and shall there commit murder. robbery. larceny, trespass or other crime. against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States: or, unauthorized by law, and with a hostile Intention. shall he found on any Indian land") ; Act of June 30. 1834. 4 Stat. 729 ("That where. in the commission. by a white person, of any crime. offense, or misdemeanor, within the Indian Country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had *for* such crime. offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured. or destroyed.") : cf. R. S. § 2143. 25 U. S. C. 212 (imposing penalty for Offense of arson in Indian country) ; R. S. § 2142, 25 U. S. C. 213 (imposing penalty for crime of assault in Indian country).

[197] Sec. 7.

[198] 1 Stat. 329. See Chapter 4. sec. 2.

[199] Act of March 3, 1799, sec. 5, 1 Stat. 743, 745.

[200] Act of March 1, 1793, sec. 15, 1 Stat. 329. 332.

[201] 1 Stat. 469. See Chapter 4. sec. 2.

[202] Act of March 30, 1802, 2 Stat. 139.141. See Chapter 4, sec. 3.

[203] 4 Stat. 729. See Chapter 4. sec. 6.

[204] R. S. § 2117, 25 U. S. C. 179.

[205] Trespass on Indian Lands. 16 Op. *A.* G. 568 (1880).

[206] *Ash Sheep Co.* v. *United States, 252* U. S. 159 (1920). a'ffg 250 Fed. 591 (C. C. A. 9. 1918), and 254 Fed. 59 (C. C. *A.* 9, 1918) ; Driving Stock on Indian Lands, *18* Op. A. *C.* 91 (1884) ; *United States* v. *Matlock, 26* Fed Cas. No. 15744 (D. C. Ore. 1872). holding that the word cattle includes both sheep and all other animals used by man for labor or food.

[207] 15 stat. 17.

dians' possessory right in such reservations was secured by the following statutory language :

> • • • Said district or districts. when so selected. and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon. and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States. (Sec. 2.)

B. CONGRESSIONAL RESPECT FOR TRIBAL POSSESSION

In addition to the foregoing statutes prohibiting various forms of trespass upon Indian lands, there is a considerable body of legislation which extends recognition to tribal possession by exempting tribal lands from provisions designed to open up the public domain to settlement.[208] Thus, for example, the Act of March 3. 1853,[209] relating to public lands In California. protects from settlement "any tract of land in the occupation or possession of any Indian tribe."[210]

The Act of May. 17, 1884,[211] relating to Alaska contains a special proviso :

> *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them hut the terms under which such persons may acquire title to such kinds is reserved for future legislation by Congress : • • • (P. 26.)

Protection of Indian possession is likewise the purpose of a provision in the Act of March 3, 1891,[213] establishing a court of private land claims to determine land claims in former Mexican territory within New Mexico, Arizona. Utah, Nevada, Colorado, and Wyoming :

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

In the same spirit, grants of rights-of-way were frequently conditioned upon a special undertaking by the grantee that it

> • • • will neither aid. advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands. and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided.* That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.[212]

In 1888 the Attorney General was able to say :[214]

> • • • it was and is a well-known usage of the Government not to sell lands until the Indian title of occupancy should be extinguished • • •.

Even where Congress has not specifically provided for the protection of Indian possessory rights, the courts have read an implicit qualification into general legislation relating to the public domain, in order to protect such possession.

Thus, in the case of *Spalding* v. *Chandler*, the Supreme Court declared :[215]

> • • • The general grant of authority conferred upon the President by the act of March 1. 1847, c. 37, 9 Stat. 146, to set apart such portion of lands within the land district then created as were necessary for public uses, cannot be considered as empowering him to interfere with reservations existing by force of a treaty: (P. 405.)

Likewise, school Land grants have never been made in disregard of tribal possessory rights.[216] In the absence of an expressed intent of Congress to the contrary, railroad land grants have not affected tribal possessory rights.[217] Even where Congress expressly stipulated to extinguish Indian title, railroad land grants conveyed only the naked fee, subject- to tribal occupancy and possessory rights.[218] *Only* where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights.[219]

C. WHO MAY PROTECT TRIBAL POSSESSION

The protection of tribal possessory rights has been recognized as a proper function of the Army,[220] of the Interior Department,[221] and of the 'Department of Justice.[222] At the same time, the interest of the tribes themselves in self-protection has been recognized repeatedly in statutes.[223]

Although primary concern for the protection of Indian lands against trespass rests with the Indian tribe and the Federal Government, it has been held that the individual states have a legitimate interest in protecting Indian possession against trespass. Thus. it was early held by the Supreme Court that state laws protecting Indian lands against trespass were valid, and state decisions thereon entitled to great weight.[224] Where a state patent to land included land reserved for Indians under state law. it was held that such patent was void as to the erroneously

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[208] Act of March 2. 1907. 34 Stat. 1229 (permission to landowners or entrymen to complete tracts at expense of reservation limited so as to exclude "lands in the use or occupation of any Indian having tribal rights on the Coeur d'Alene Reservation").

[209] 10 Stat. 244.

[210] Accord : Act of March 25, 1864. 13 Stat. 37.

[211] 23 Stat. 24. See chapter 21, sec. 8C.

[212] 26 Stat. 854.

[213] Act of September 1, 1888, 25 Stat. 452. 457 (Shoshone and Bannock) : Act of March 3. 1887. 24 Stat. 545; Act of October 1, 1890. 26 Stat. 663.

[214] 19 Op. A. G. 117 (1888).

[215] 160 U. S. 394, 405 (1896). Accord: *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) ; *United States* v. *Minnesota*, 270 U. S. 181 (1926). But *cf. United States* v. *Portneuf-Marsh Valley Irr. Co.*, 213 Fed. 601 (C. C. A. 9. 1914. aff'g 205 Fed. 416 (D. C. Idaho 1913). And see Hot *Springs Cases*, 92 U. S. 698. 703-704 (1875) (Indian possession protected against settlers by deny'ng them preemption claims).

[216] *Beecher* v. *Wetherby*. 95 U. S. 517. 526 (1877) ; *Wisconsin* v. *Hitchcock*, 201 u. S. 202 (1906).

[217] *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733 (1875) ; *Northern Pac. Ry. Co.* v. *United States*. 227 U. S. 355 (1913).

[218] *Buttz* v. *Northern Pac. Railroad.* 119 U. 8. 55 (1886).

[219] Oregon Donation Act of September 27. 1850. c. 76 secs. 4. 5. 9 Stat. 496. 497. 498: New Mexico Donation Act of July 22. 1854. c. 103. sec. 2. 10 Stat. 308: Homestead Act of May 20. 1862. c. 75. 12 Stat. 392.

[220] *See United States ex rel. Gordon* v. *Crook*, 179 Fed. 391 (D. C. Nebr. 1875).

[221] *United States* v. *Mullin*, 71 Fed. 682 (D. C. Nebr., 1895).

[222] See, for instance. Joint Resolution of March 3. 1879. 20 Stat. 488. superseded by Act of March 1. 1889. 25 Stat. 768 (instructing Attorney General to bring suit to quiet tribal title) ; sec. 3. Pueblo Lands Act of June 7. 1924. 43 Stat. 636 (discussed in Chapter 20, sec. 4). And see Chapter 19, sec. 2A(1).

[223] Thus, for instance, sec. 2 of the Act of June 28. 1898. 30 Stat. 495 requires the courts in the Indian Territory to make tribes parties to suits affecting their possessory rights "by service upon a chief or governor of the tribe" whenever it appears "that the property of any tribe is in any way affected by the issues being heard." Sec. 4 of the Pueblo Lands Act of June 7. 1924. 43 Stat. 636. expressly protects the right of the individual Pueblos to bring suit In vindication of their land claims. The right to protect tribal property against trespass. inures only to the tribe whose land it is and not to Indians of another tribe who happen to be on the land *Merchant* v. *United States*, 35 C. Cls. 403 (1900).

[224] *Danforth's Lessee* v *Thomas*. 1 Wheat. 155 (1816) : *Preston* v. Browder. 1 Wheat. 115 (1816). See also *Danforth* v. *Wear*, 9 Wheat. 673. 677 (1824).

included Indian lands.[226] The constitutionality of state legislation designed to protect Indian lands from trespass was upheld by the Supreme Court in *State of New* York *v. Dibble.*[226]

In that case the court declared, *per* Grier, *J.:*

> The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. * * * The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. (P, 370.)

D. EFFECT OF TITLE UPON POSSESSORY RIGHT

The, protection which/the Federal Government gives to tribal possession is not limited to. the. cases where title to tribal land is held in the name of the United States, but extends equally to lands where ultimate title is vested in the state. An illuminating analysis of this problem is found in a memorandum to the Assistant Attorney General dated April. 29, 1935, regarding the Onondaga Reservation.[227] Copious authority is cited to show that even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state:

> As guardian of the Indians there is imposed upon the Government a duty to protect these Indians in their property ; it follows that this duty extends to protecting them against the unlawful acts of the State of New York. (P. 222.)[228]

Likewise, it has been held that protection of. tribal property by the Federal Government is not forsworn where a tribe incorporates under state law and thus achieves corporate capacity.[229]

E. AGAINST WHOM PROTECTION EXTENDS

Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers. Thus where Indians were induced by administrative authorities to settle on a given area and the area was designated as the "Old Winnebagoe and Crow Creek Reservation" on Indian office maps, it was held that such lands were a "reservation" within the meaning of a subsequent treaty which set "reservation" lands apart "for the absolute and undisturbed use and occupation of the Indians herein name& and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; * * *."[230] It was further held that a later Executive order of February 27, 1885, opening these lands to entry was invalid and inoperative.[231]

It was likewise ruled by the Attorney General that an application for permission to construct a ditch across an Executive order reservation, without the consent of the Indians, could not be legally granted by Interior Department officials, even though the ditch was- supposed to be beneficial to the Indians. The Attorney General declared:

> But the petitioners allege the reservation is not a legal one. and in consequence thereof the Indians for whom the reservation was made are only tenants at will of the Government. But the rights of tenants at will, so long as the landlord does not elect to determine the tenancy, are as sacred as those of a tenant in fee.[232]

It has also been held [233] that the Federal Government is under an obligation to protect tribal lands even against fellow tribesmen.

The respect for tribal possessory rights shown by Congress and the courts has not always been shared by administrative authorities. In recent years, however, the Department of the Interior has strictly adhered to the view that a tribe may exclude from tribal property any nonmembers not specially authorized by law to enter thereon, that, having the right so to exclude outsiders, the tribe may condition the entry of such persons by requiring payments of fees, and that federal authorities, in the absence of specific legislative authorization, may not invite outsiders to enter upon tribal lands without tribal consent.

Indian possessory rights are enforceable against state authorities as well as against federal authorities.[224] Thus, where a treaty between the United States and the Seneca Nation provided:

> The United States acknowledge all the land within the aforementioned boundaries (which include the reservations in question) to be the property of the Seneca nation, and the United States will never claim the same nor disturb the Seneca nation, * * • in the free use and enjoyment thereof; but it shall remain theirs until they choose. to sell the same * * ● . (Pp. 766-767.)

the Supreme Court held that state taxation of tribal lands was inconsistent with the treaty and invalid.[235] The court declared:

> The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from -generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1834.* (P. 771.)
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> * 4 Stat. at Large. 730. (P. 771.)

The question of how far Indian possessory rights are protected against Congress raises a problem of constitutional law considered earlier in Chapter 5.

With the establishment of the right of Indian tribes to the protection of federal and state governments (as well as self-protection) against trespass, whether by private parties or by state or federal officers, it becomes pertinent to consider the exact extent of the possessory right to which this protection attaches.

[225] *Danforth* v. *Wear, supra; Patterson v. Jenks,* 2 Pet. 216 (1829).
[226] 62 U. S. 366 (1858).
[227] 5 L. D. Memo. 179. April 29, 1935.
[228] *Ibid.*
[229] United *States* v. *7,905.5 Acres* of *Land,* 97 F. 2d 417 (C. C. A. 4, 1938.) And see 12 L. D. Memo. 206. January 14. 1938.
[230] Treaty of April 29 *et seq.* 1868, 15 Stat. 635.
[231] Old Winnebago and Crow Creek Reservation. 18 Op. A. G. 141 (1885).
[232] Lembi Indian Reservation, 18 Op. A. G. 563 (1887).
[233] *St. Marie* v. *United States, 24* F. Supp. 237 (D. C. S. D. Cal. 1938). See also Chapter 9. sec. 5C.
[234] *Danforth* v. *Wear, 9* Wheat. 673 (1824).
[235] *The* New *York Indians, 5* Wall. 761 (1866). See Chapter 13, secs. 1-3.

SECTION 11. EXTENT OF TRIBAL POSSESSORY RIGHTS

The extent of possessory right vested in an Indian tribe may differ in important respects from that of ordinary private possessory rights. Some of these differences run to the advantage of the Indian tribe; others, to its disadvantage.

Because an Indian tribe is a ward of the Government. it has been held that adverse possession under the statute of limitations does not run against an Indian tribe. even where title to the land is vested in the tribe and the tribe is incorporated under

state law.[236] This rule was slightly modified by Congress, with respect to the Pueblos of New Mexico, in view of the fact that for many years these Pueblos had enjoyed the right to sue and be sued under territorial law.[237] The compromise adopted in the Pueblo Lands Act of June 7, 1924,[238] was to the effect that adverse possession might be established by proof of (a) "open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act" together with proof of tax payments, or *(b)* such possession "with claim of ownership, but without color of title from the 16th day of March, 1889."

While tribal lands are, like other lands, subject to the federal power of eminent domain,[239] they are not subject to the state power of eminent domain except where Congress has specifically so provided.[240] The constitutionality of congressional acts conferring upon state or private agencies the power to condemn tribal laud is established beyond question.[241]

Tribal possessory rights may, as we have already noted, be expressly qualified by the statute, treaty, or Executive order establishing the right, and In this way made subject, for instance, to entry under public land mineral laws.[242]

Except for special limitations and special advantages of the type above noted, tribal possessory rights are equivalent in extent to the possessory rights of private persons.[243]

[236] *United States v. 7,405.3 Acres of Land*, 97 F. 2d 417 (C. C. A. 4. 1938) : *United States v. Wright*, 53 F. 2d 300 (C. C. A. 4. 1931) : Memo. re Eastern Band of Cherokee Indians of North Carolina. 7 L. D. Memo. 517. 531. 534, August 4. 1936. Memo. re 97 F. 2d 417. 12 L. D. Memo. 206. 210. January 14. 1938. Accord: *United States v. Candelaria*, 271 U. S. 432. 440 (1926) : *United States v. Minnesota*, 270 U. S. 181. 196 (1926) ; *United States v. Sandoval*, 231 U. S. 28 (1913) ; *Heckman v. United States*, 224 U. S. 413, 438 (1912).

[237] See Chapter 20. sec. 4.

[238] 43 Stat. 636.

[239] *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641 (1890). reversing 33 Fed. 900 (D. C. W. D. Ark. 1888) (interpreting Act of July 4. 1884. 23 stat. 73).

[240] *United States v. Minnesota*, 95 F. 2d 468 (C. C. A. 8. 1938). aff'd. sub nom. *Minnesota v. United States*, 305 U. S. 382 (1939) ; *United States v. Colvard*, 89 F. 2d 312 (C. C. A. 4, 1937) ; Op. Sol. I. D.. M.29961, October 4. 1938 (Eastern Cherokees) ; see Act of February 28, 1919, 40 Stat. 1206, authorizing condemnation of laude of Capitan Grande Reservation by the City of San Diego, subject to the approval of the terms of the judgment by the Secretary of the Interior. Accord: Act of June 28. 1898. sec. 11. 30 Stat. 495. 498 (authorizing towns and cities in Indian Territory to condemn tribal lauds).

[241] The extent and basis of this power is analyzed in Federal Eminent Domain (1939), Secs. 9 and 15N. See also Randolph, Eminent Domain (1894) sec. 30 and cases cited.

[242] Op. Sol. I. D... M.28183. October 16, 1935, holding that prospectors taking by claim on Papago Indian lands under 'public land mineral laws, must pay tribe for surface use if claim was taken up after passage of Act of June 18, 1934. 48 Stat. 984, but not if claim was taken up prior to such act.

[243] See Act of July 14, 1862. 12 Stat. 566. granting to white settlers the value of Improvements on lands occupied by them which are reserved for Indian use. showing Congress' assumption that the establishment of the Indian reservation wiped out the claims of the prior settlers. Accord : Act of June 3. 1874, 18 Stat. 555 (Makah) ; Act of March 3, 1885, 23 Stat. 677 (Duck Valley). See also Act of August 4. 1886. 24 Stat. 876 (refund to entryman of payments made to land office where entry on Indian reservation was subsequently canceled). Cf. Joint Resolution, of February 8. 1887. 14 Stat. 640 (Sioux) ; Act of February 11. 1920. 41 Stat. 1459 (Siletz) ; Act of March 3. 1925. 43 Stat 1586 (L'Anse and Vieux Desert).

SECTION 12. THE TERRITORIAL EXTENT OF INDIAN RESERVATIONS

In determining the extent of Indian tribal lands, first importance naturally attaches to the treaty, statute, or other document upon which tribal ownership is predicated or by which it is defined. The fixing of boundaries of Indian reservations was a major part of early governmental policy in Indian affairs. as a means of securing peace between Indians and whites and among the Indian tribes themselves.[244] Both by treaty[245] and by statute[246] the United States has endeavored to settle conflicting claims and to resolve ambiguities in the definition of reservation boundaries.[247]

Where the delimitation of tribal lands has proved to be of special difficulty, Congress has occasionally referred the determination of such boundaries to the Court of Claims,[248] or the Secretary of the Interior,[249] or has established a special tribunal to determine such questions.[250]

In interpreting treaties and statutes defining Indian boundaries, the Supreme Court has said:

> * * * our effort must be to ascertain and execute the intention of the treaty makers. and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties. United States v. *Winans, 198* U. S. 371. The present case invokes in special degree the principle.[251]

Apart from the foregoing principle. the same rules apply to the resolution of ambiguities in reservation boundaries as are applied to similar ambiguities in other deeds or patents.[252]

It is presumed that the bed of a navigable stream is not conveyed to an Indian tribe but is reserved by the United States for the future state to be established.[253] However, an intent to confer ownership rights upon the Indian tribe in such stream bed may be shown by the context of the boundary description,[254] and such intent appears definitely where territory on both sides of the river is reserved to the Indian tribe. As was said in *Donnelly v. United States:*[255] "It would be absurd to treat the order as intended to include the uplands to the width of one mile to each side of the river, and at the same time to exclude the river" (at p. 259).[256] Tide lands and beds of navigable streams which have been made a part of an Indian reservation

[244] See Chapter 3. sec. 3A(2). The fixing of intertribal boundaries was the chief purpose of certain treaties. e. *g.*, Treaty of August 19. 1825. with Chippewas *et al.*. 7 Stat. 272 ; see 5 Op. A. G. 31 (1848).

[245] See Chapter 3. sec. 3A(2).

[246] Act of March 3. 1875. 18 Stat 476 (boundary between State of Arkansas and Indian country) ; Act of June 6. 1894. 28 Stat. 86 (Warm Springs Reservation) ; Act of June 6. 1900. 31 Stat. 672 (conflicting tribal claims of Choctaw-Chickasaw and Comanche, Kiowa. and Apache).

[247] To the effect that the parties to a treaty are authorized to determine its meaning. and to define boundaries which the terms of the treaty leave unclear. see *Lattimer v. Poteet*, 14 Pet. 4 (1840).

[248] Act of January 9. 1925. 43 Stat. 730 (title to Red Pipestone Quarries) ; *cf.* Act of June 28, 1898. sec. 29. 30 Stat. 495. 513.

[249] Act of June 7. 1872. 17 Stat. 281 (Sisseton and Wahpeton).

[250] Act of March 3. 1851, sec. 16. 9 Stat. 631. 634 (California private laud claims) ; Pueblo Lands Act of June 7, 1924, 43 Stat. 636. discussed In Chapter 20, sec. 4.

[251] *Northern Pacific Ry. Co. v. United States*. 227 U. S. 355. at p. 362 (1913). aff'g 191 Fed. 947 (C. C. A. 9. 1911).

[252] *Meigs v. M'Clung's* Lessee. 9 Cranch 11 (1815) (holding that unilateral action ot United States agents cannot give meaning to treaty. which is a bilateral contract). See also 29 Op. A. G. 455 (1912) (Chippewa).

[253] *United States v. Holt State Bank*, 270 U. S. 49. 55 (1926). aff'g 294 Fed. 161 (C. C. A. 8. 1923).

[254] *United States v. Hutchings*, 252 Fed. 841 (D. C. W. D. Okla. 1918), aff'd sub nom. *Commissioners v. United States*. 270 Fed. 110 (C. C. A. 8. 1920), app. dism. 260 U. S. 753 (land to middle of nonnavigable river included in Osage Reservation). Accord : *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77 (1922), aff'g 270 Fed. 100 (C. C. A. 8. 1920), and 249 Fed. 609 (D. C. W. D. Okla. 1918).

[255] 228 U. S. 243 (1913).

[256] Followed in 55 I. D. 475 (1936) (Fort Berthold Reservation). Memo. Sol. I. D.. July 5. 1939 (Owhi Lake in Colville Reservation).

by treaty or otherwise [257] do not pass to a state subsequently created, as do public lands similarly situated.[258] Where the high-water mark is referred to in designating the boundaries of an Indian reservation, there is no implied reservation of tide lands.[259]

The- principles of international law applicable to boundary disputes have been invoked in reaching the determination that an island once part of an Indian reservation remains so although it becomes attached to the opposite bank of the river through a sudden change in the stream bed.[260]

In other cases local state law has been invoked to settle ambiguities,[261] and it has been held that where, under Minnesota law, the title of the riparian owner stops at the water's edge, the Ownership by an Indian tribe of the entire shore line of a lake will not disturb state ownership of the lake bed.[262]

Errors in surveying boundaries Bred by treaties or statutes have occasionally given rise to tribal claims.[263]

[257] *United States* v. *Boynton*, 53 F. 2d 297 (C. C. A. 9, 1931) rev'g 49 F. 2d 810 (D. C. W. D. Wash. 1931) (land between high add low tide reserved for tribe, not allottees); *United States* v. *Romaine*, 255 Fed. 253 (C. C. A. 9. 1919). But *cf. United States* v. *Snohomish River Boom Co.*, 246 Fed. 112 (C. C. A. 9. 1917).

[258] *United States* v. *Stotts*, 49 F. 2d 619 (D. C. W. D. Wash. 1930); *Taylor* v. *United States*, 44 F. 2d 531 (C. C. A. 9, 1930); Op. Sol. I. D., M. 28120. March 31. 1936.

[259] *United States* v. *Holt State Bank*, 270 U. S. 49. 55 (1926). aff'g 294. Fed. 161 (C. C. A. 8, 1923); *Taylor* v. *United States*, 44 F. 2d 531 (C. C. A. 9, 1930), cert. den. 283. U. S. 820; *United States* v. *Ashton*, 170 Fed. 509 (C. C. W. D. Wash. 1909). app. dism. sub nom. *Bird* v. *Ashton*, 220 U. S. 604 (1911). without opinion.

[260] Sheyenne Island, Missouri River. 18 Op. A. G. 230 (1885).

[261] *United States* v. *Ladley*, 4 F. Supp. 580 (D. C. N. D. Idaho, 1933).

[262] Memo Sol. I. D., December 19. 1936.

[263] See, for example, *Creek Nation* v. *United States*, 302 U. S. 620 (1938). rev'g 84 C. Cls. 12. Other aspects of the case are considered in 295 U. S. 103 (1935), rev'g 77 C. Cls. 159, and in 87 C. Cls. 280 (1938).

SECTION 13. THE TEMPORAL EXTENT OF INDIAN TITLES

The question of when Indian possessory rights in a given tract of land come to an end, or, in technical terms, the question of the quantum of the tribal estate in land, has generally been raised in connection with such title as depends upon actual occupancy. The assumption that all possession of lands by Indian tribes is of an identical type has elsewhere been discussed and criticized and need not be reexamined at this point.[264]

Within the diversity of tenures by which tribal lands are held, there undoubtedly exists a type of ownership that ceases when the tribe becomes extinct or abandons the land. Although this circumstance is commonly cited as indicating a peculiar tenure by which Indian lands are held, an examination of the prevailing doctrines of real property law at the time when the theory of "Indian title" was first advanced, shows that there is nothing novel or peculiar about the legal justification or the practical significance of the doctrine. Under the feudal theory of English law, where the owner of land died without heirs or committed a felony, the land escheated to the Crown. or to the mesne lord. This right of escheat was not, strictly speaking, a form of inheritance but was a sovereign right superior to the property right of any landlord.[265] The right of escheat became less valuable, with respect to individual landowners. when the statutory right of testamentary disposition was extended to real property. An Indian tribe, however. could not, under British or American law, alienate its land without the consent of the Crown or the Federal Government. Therefore, the possibility that land would be left vacant when a tribe disintegrated or abandoned the land was a real possibility and the rule of escheat served the same purpose that it served under early feudal conditions in England. Land held by a tribe in fee simple would be subject to escheat and it is unnecessary to assume any peculiarity of "Indian title" to explain this result.

Although technically the right of escheat was something entirely distinct from a possibility of reverter, there is ample precedent for confusing the two institutions.[266] Thus, although one might say with perfect accuracy that land held by an Indian tribe in fee simple would escheat to the United States when the tribe became- extinct or abandoned the property, it became fashionable to refer to this incident as a possibility of reverter, rather than escheat. This use of language was not restricted to Indian tribes, but was applied. in the early nineteenth century. to all corporations under the doctrine that a corporation had "only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation. the reverter is. to the original grantor or his heirs." [267] It was generally agreed that "corporations have a fee simple for the purpose of alienation," [268] but this Portion of the doctrine was, of course, inapplicable to Indian tribes.

If these observations are well taken, we should conclude that it makes little practical difference whether we describe an Indian estate as a fee simple absolute subject to the ordinary sovereign right Of escheat, or call the Indians' estate a determinable fee with a possibility of reverter in the sovereign, or refer to "Indian title of use and occupancy."

The only Point at which these various theories may Perhaps diverge lies in the test to he applied to determine when laud has been "abandoned."

In *Holden* v. *Joy* [269] the Indian estate in question was to be, according to the governing treaty. a fee simple, but the patent issued by the President included the condition "that the lands hereby granted shall revert to the United States, if the said Cherokees become extinct, or abandon the same." [270] The Supreme Court rejected the argument that such abandonment took place by reason of (a) Cherokee participation in the Civil War on the part of the Confederacy. or (*b*) an agreement whereby the Cherokees allowed Congress to sell the land for their benefit. The Court held that the Cherokee title continued until, by the agreement in question. title became vested in the United States. The Court further declared :

> Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent. deriving their title, as they claimed, from the Great Spirit. to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws. usages, and customs. . . *
>
> . . * . .
>
> 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. Unmistak-

[264] See secs. 5, 6, 10. and 18 of this chapter.

[265] See "Escheat," 5 Encyc. Soc. Sci. 591 (T. F. T. Plucknett).

[266] *Op. cit.* note 131.

[267] 2 Kent Commentaries 282. And see 4 Thompson on Corporations, 3d ed., 1927. sec. 2455.

[268] *Ibid.*

[269] 17 Wall. 211 (1872).

[270] Quotation from patent. Ibid.

> ably 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. (Pp. 243–244.)

Again, the Supreme *Court* held in *New York Indians v. United States*,[271] that delay in the settlement of new lands did not constitute abandonment.[272] On the other band, the Supreme Court, holding that 'the Pottawatomies do not own a large part of the city of Chicago, indicated as one basis for its decision the fact that the Pottawatomies had, after conveying at least all the lands above the lake level, abandoned the district for more than half a century.[273] It appears to be settled law that actual removal of an entire tribe from one reservation to another where such removal is voluntary, constitutes abandonment.[274]

Although various dicta may be found asserting that the title Of Indian tribes is less, in point Of temporal extent, than a fee simple, reliance upon such dicta has proven extremely hazardous.[275] A realistic analysis of the cases suggests that the only clear distinction between "Indian title" and "fee simple title" lies in the fact that Indian lands are subject to statutory restrictions upon alienation.[276]

[271] 170 U. S. 1 (1898), app. dism. 173 U. S. 464.

[272] *Of The New York Indians*, 5 Wall. 761 (1866) (holding that interest in original land continues until date fixed for removal).

[273] *Williams v. City Of Chicago*, 242 U. S. 434 (1917).

[274] *Buttz v. Northern Pacific Railroad*, 119 U. S. 55 (1886); *Shore v. Shell Pet. Corp.*, 60 F. 2d 1 (C. C. A. 10. 1932). aff'g. 55 F. 2d 696, cert. d:n. 287 U. S. 656. And see cases cited in sec. 4, *supra*.

[275] See, for instance, the discussion of "waste" in *United States v. Cook*, 19 Wall. 591. 693 (1873). and erroneous decisions, based on this discussion, which are noted in sec. 15, *infra*.

[276] See sec. 18. *infra*.

SECTION 14. SUBSURFACE RIGHTS

Whether the possessory right of an Indian tribe includes minerals depends, as does every other question relating to the extent of Indian possessory rights, upon the treaty, statute, Executive order or other document or course of action upon which the right is based. Where a treaty, statute, or Executive order specifically provides that minerals on Indian land shall be reserved to the United States [277] or where a statute specifies that title to land purchased for an Indian tribe shall not extend to mineral rights,[278] no question is likely to arise. So. too, a treaty or statute may provide that the Indian tribe shall have specified rights of mining or quarrying in land belonging to the United States.[279]

Questions as to the Indian right to minerals have generally arisen where nothing specific appears in the treaty, statute, or other document upon which the Indian claim is based, or where the Indian claim is based simply on aboriginal occupancy. Confirmation of the view that aboriginal occupancy may include subsurface rights as well as surface rights is found in the case of *Chouteau v. Molony*.[280] A treaty provision by which designated lands were "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians" was held to convey to the Indians full mineral, as well as timber, rights, in the case of *United States v. Shoshone Tribe*.[281]

Further analysis of the extent of Indian mineral rights is found in the opinion [282] of Attorney General (afterwards Justice) Stone rendered on May 27, 1924, with reference to the proposal of Secretary of the Interior Fall to open Executive order reservation lands to mineral entry under the laws governing. minerals within the public domain. After analyzing the terms of the general mining laws, the Attorney General declared:

> The general mining laws never applied to Indian reservations, whether created by treaty, Act of Congress. or executive order. *Noonan v. Caledonia Min. Co., 121* U. S. *393; Kendall v. San Juan Silver* Mining Co.. 144 U. S. 658; *M'Fadden v. Mountain View M. & M. Co.*, 97 Fed. 670; *Gibson v. Anderson.* 131 Fed. 39.

In support of this conclusion, based upon the language of the general mining laws. the Attorney General presented an analysis of Indian mineral rights which may well be set forth in full, without comment, as a complete exposition of the subject.

> If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right Of "occupancy and use" included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however. that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the Present time. Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course. that minerals and all other hidden or' latent resources would go with the fee. The same is true of the General Allotment Act of 1887. which applies expressly to executive order reservations as well as to others. Then, beginning years ago, many special acts were passed (with or without previous agreements with the Indians concerned) whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. in all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value. less only the expenses of the Government in surveying and selling the land. Legislation and treaties of this character were dealt with in *Frost v. Wenie*, 157 U. S. 46. 50; Minnesota v. *Hitchcock, 185* U. *S. 373; Lone Wolf v. Hitchcock. 187* U. S. 553: United *States v. Blendaur, 128* Fed. 910, 913; *Ash Sheep Co. v. United States. 252* U. S. 159.
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> Similar provisions have been made in many other cases for the sale of surplus tribal lands, all the proceeds of all elements of value to go to the tribe. In a recent Act for further allotment of Crow Indian lands (41 Stat. 751), the minerals are reserved to the tribe instead of passing to the allottees (Sec. 6) ; and moreover. unallotted lands chiefly valuable for the development of water Power are

[277] See, for example, Art. III of Treaty of August 5. 1826. with the Chippewa Indians, 7 Stat. 290; Act of February 21. 1931. 46 Stat. 1202 (Papago Indians), construed in Op. Sol. I. D., 56.27656, March 7. 1934. and Op. Sol. I. D.. M.27656, May 7. 1934.

[278] Act of February 15. 1929, 45 Stat. 1186 (Alabama and Coushatta) : Act of June 22. 1936. 49 Stat. 1806 (Walker River) ; Act of June 26. 1936. sec. 1. 49 Stat. 1967. 1968. 25 U. S. C. 507 (Oklahoma).

[279] *Yankton Sioux Tribe* v. United States. 61 C. Cls. 40 (1925). In this case it was held that a treaty reservation of the right to quarry pipestone in a given area did not confer upon the tribe concerned a right of occupancy. The suit was brought under sec. 22 of the Act of April 4. 1910 36 Stat. 269. 284. on the basis of the Treaty of April 19. 1858. 11 Stat. 743. The decision was reversed on other grounds in 272 U. S. 351 (1926)

[280] 16 How. 203 (1853). *Cf.* Joint Resolution of April 16. 1800. 2 Stat 87. authorizing the President to determine whether Indian title to copper lands adjacent to Lake Superior was "yet subsisting. and if so. the terms on which the same can be extinguished." But cf. discussinn of separation of surface and mineral rights under Spanish law, in Op. Sol. I. D.. M.27656, March 7. 1934.

[281] 304 U. S. 111 (1938). aff'g *Shoshone Tribe* v. *United States*, 85 C. Cls. 331 (1937) : the argument *contra* wilt be found In a memorandum of the Assistant Attorney General dated December 8. 1937 (11 I. D. Memo. 468).

[282] 34 Op. A. G. 181 (1924). This opinion follows that of Solicitor Edwards of the Department of the Interior (A.2592), dated February 12, 1924.

reserved from allotment "for the benefit of the Crow Tribe of Indians" (Sec. 10). The Federal Water Power Act of June 10, 1920 (41 Stat. 1063), applies to tribal lands In Indian reservations of all kinds, but it provides (Sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians," etc.

Again, by a provision in the Indian Appropriation Act of June 30, 1919, the Secretary of the Interior was authorized to lease, for the purpose "of mining for deposits of gold, silver, copper, and other -valuable metalliferous minerals," any part of the unallotted lands within "any Indian. reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming" heretofore withdrawn from entry under the mining laws. These States contain numerous executive order reservations, and yet the Act declares that all the royalties accruing from. such leases shall be paid, to the United States "for the benefit of the Indians." (41 Stat. 3, 31–33.)

The opening to entry bv Congress of a part of the Colville Reservation established in Washington 'by executive order has been cited as an exception to this line of precedents. (Act July 1, 1892, 27 Stat. 62.) But the exception is more apparent than real; for Congress, though it expressly declined to recognize affirmatively any right in the Indians "to any part" of that reservation (Sec. 8), yet, in fact, preserved the-right of allotment, required, the entrymen to pay for the lands, and set. aside the proceeds for the benefit of the Indians for an indefinite 'period. Later, the proceeds of timber sales from the former reservation lands were secured to the Indians, but the mineral lands were subjected to the mineral laws without any express direction for the disposal of the proceeds, if any. (Act July 1, 1898, 30 Stat. 571. 593.) The Committee reports show that the reservation was considered as improvidently made, excessive in area, and that the action taken was really for the best interests of the Indians. (Senate Report No. 664, 52d Cong., 1st sess., vol. 3; House Report No. 1035, 52d Cong., 1st sess., vol. 4.)

In respect to legislation and. treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. Second, that the Indian possession extended to all elements of value in or connected with their lands, and the Government, in securing those values to the Indians recognizes and confirms their pre-existing right. If it were necessary here to decide as between these opposing views. I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, Or by the exercise of that plenary *power* of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf v.* *Hitchcock*, 187 U. S. 553. Moreover, support for this view is found in many expressions of the courts.* * *

* , • * * *

The important matter here. however, is that neither the courts nor Congress have made any distinction as to the character or extent of the Indian rights. as between executive order reservations and reservations established by treaty or Act of Congress. So that if the General Leasing Act applies to one class, there seems to be no ground for holding that it does not apply to the others. (Pp. 189–192.)

Various special acts relating to the disposition of minerals on Indian reservations proceed on the assumption that, in the absence of a clear expression to the contrary, tribal possession extends "to the center of the earth."[283] Generally such statutes provide that the proceeds of such disposition shall inure to the benefit of, the tribe concerned.[284]

Recognition Of Indian mineral rights is also found in special statutes authorizing Indian tribes to execute mineral leases.[285] Further recognition of tribal mineral leases is found in the statutes referred to in Attorney General Stone's opinion, which, in allotting lands, reserved to the tribe the underlying mineral rights.[286]

Further recognition of Indian mineral rights is found in various jurisdictional acts.[287]

As noted in Attorney General Stone's opinion, the authorities are uniform in holding that minerals underlying Indian lands which have not been expressly reserved to the United States are not subject to disposition under the general mining laws.[288]

Under the foregoing authorities it must be held that Indian title to minerals is valid as against federal administrative authorities, as well as against private parties.[289]

[283] Act of July 1, 1902, 32 Stat. 641 (Choctaw-Chickasaw), 'construed in 35 Op. A.. G. 259 (1927); Act of January 21, 1903. 32 Stat. 774 (timber and stone in Indian Territory). *Cf.* Act of February 20, 1896, 29 Stat. 9 (opening designated area of Colville Reservation to entry under general mineral land laws) construed in *United States* v. *Four Bottles Sour-Mash Whiskey*, 90 Fed. 720 (D. C. Wash. 1898). *Cf.* also Act of August 14, 1848, 9 Stat. 741 (Ottawa, Pottawatomie, Chippewa, etc.).

[284] Act of May 30, 1908, 35 Stat. 558 (Fort Peck Indian Reservation); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Indian Reservation); Act of January 11. 1915, 38 Stat. 792 (Rosebud Indian Reservation); Act of February 27. 1917. 39 Stat. 944 (an act to authorize agricultural entries on surplus coal lands in Indian reservations).

[285] Act of August 7, 1882. 22 Stat. 349 (Cherokee salt mines). And see sec. 19, infra.

[286] Act of March 3. 1927. 44 Stat. 1401 (Fort Peck) : Act of June 28, 1906, 34 -Stat. 539 (Osage), construed in 33 OP. A. G. 60 (1921). recognized in the Act of March 3, 1909, 35 Stat. 778, period of tribal ownership extended by Act of March 3. 1921. 41 Stat. 1249 and Act of March 2, 1929. 45 Stat. 1478; constitutionality of extension upheld in *Adams* v. *Osage Tribe of Indians*, 59 F. 2d 653 (C. C. A. 10. 1932), aff'g. 50 F. 2d 918 (D. C. N. D. Okla. 1931), cert. den. 287 U. S. 652; Act of July 1. 1898, 30 Stat. 567 (reserving to Seminole tribe half interest in minerals underlying allotted lands).

[287] Act of February 20, 1929, 45 Stat. 1249 (Nez Perce jurisdictional act recognizing propriety of tribal claim for gold mined by trespassers).

[288] *French* v. *Lancaster*, 2 Dak. 346 (1880) and cases cited in text quotation. See Martin, Mining Law and Land-Office Procedure (1908), sec. 46, and authorities cited in support of the conclusion, "Lands embraced in an Indian reservation are not subject to mining laws, or to mineral exploration and entry." Accord : Morrison's Mining Rights (16th ed., 1936), pp. 426-427; Costigan. American Mining Law (1908). sec. 23. and see early Land Office rulings cited in Copp, United States Mineral Lands (1881), 142, 253.

[289] *Cf.* Memo. Sol. I. D.. July 1. 1936 (holding Government officials are not authorized to mine coal on the Navajo Reservation without the consent of the Indians).

SECTION 15. TRIBAL TIMBER [290]

With respect to every concrete question of tribal ownership of timber, as with all other questions relating to the extent of tribal possessory right, our starting point must be the language of the treaty; statute, or other document which establishes that right. Where by treaty the United States expressly reserves the right to use timber on tribal land,[291] or where the treaty specifically confirms the interest of the Indian tribe in timber,[292] no question is likely to arise as to the extent of the tribal possessory right.[293] Serious questions have arisen, however, where

[290] For general forest regulations, see 25 C. F. R. 61.1–61.29.

[291] Art. 9 of Treaty of April 19. 1858, with Yankton Tribe of Sioux. 11 Stat. 743.

[292] Art. 10 of Treaty of January 15. 1838. with New York Indians, 7 Stat. 550; Art. 2 of Treaty of August 13. 1868. with Nez Perce Tribe, 15 Stat. 693.

[293] Nor is this question likely to arise where a statute specifies that title to land purchased for Indians may be taken subject to existing contracts for sale of timber. Act of February 15, 1929, 45 Stat. 1186 (Alabama and Coushatta).

the treaty or statute establishing the reservation has referred to "Indian use and occupancy" or used some similar phrase. These questions were seriously complicated by the interpretations placed on language of the Supreme Court in the cases of *United Stated* v. *Cook*[294] and *Pine River Logging Co. v. United States.*[295]

In the former of these cases, timber standing on tribal land was cut by individual Indians, without the authority of the Interior Department.[296] The United States brought an action of replevin against the vendee, and the Supreme Court held that the United States was entitled to recover possession of the timber. The Court based its decision upon the argument that since the timber while standing is a part of the realty, standing timber cannot be sold by the Indians, and only timber rightfully severed from the soil Can be legally sold.[297] Whether timber was rightfully severed depended upon whether its cutting resulted in improvement of the land or on the contrary, amounted to waste. Since the facts of the case established the latter situation, the Court held that the possession of the vendee was illegal. The Court did *not* decide whether, in recovering the timber or its value, the United States was to hold such timber or funds in trust for the Indian tribe concerned, or whether such recovery was to accrue to the general funds of the United States Treasury.

In the course of its opinion, the Supreme Court, *per* Waite, *C. J.*, declared:

> These are familiar principles in this country and well settled, as applicable to tenants for life and remaindermen. But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians bare the same rights In the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more. (P. 594.)

The view thus expressed was confirmed by the Supreme Court in the *Pine River Logging Co.* case.[293] where an action in the nature of trover, brought by the United States against the vendees of unlawfully cut timber, was upheld by the Court. In the course of its opinion, the Court. *per* Brown, *J.*, declared:

> The argument overlooks the fact that the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use. or to improve their land, *United States* v. *Cook*, 19 Wall. 591, except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as *sui juris*. but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the right given by the statute. (P. 290.)

In the Pine River Logging Co. case (and probably in the *Cook* case) the Department of the Interior and the Department of Justice apparently construed the decision as implying that the tribe concerned had no property interest in the timber or in the funds recovered. In an opinion rendered in 1888, the Attorney General answered in the negative the following question presented by the Secretary of the Interior.[299]

> (1) Whether the Indians occupying reservations, the title to which is in the United States, have the right, in view Of the opinion Of the Supreme Court of the United States in *the* case of the *United States* v. *George Cook* (19 Wall. 591), to cut and sell for their use and benefit the dead and down timber which is found to a greater or less extent on many of the reservations and which will go to waste If not used? (Pp. 194–195.)

Two years later the Attorney General ruled that where timber on land of the Fond du Lac tribe was cut by trespassers, with the connivance of Indian Service officials, the timber should be sold by the Commissioner of the General Land Office, the proceeds to "belong to the Government absolutely.[300]

This view was supported by the argument that, under the *Cook* case, the Indians have "the mere right to use and enjoy the land as occupants" and that, therefore, "the Indians have no interest in this timber." The Board of Indian Commissioners had protested immediately after the decision in the *Cook* case, against an interpretation of that case which would "prevent the Indians from cutting and marketing their timber," alleging that such a construction, particularly when applied to dead and down timber, "would prove not only a loss to the Indians, but an absolute damage to the United States."[301] In 1889 Congress enacted a statute authorizing the sale of dead timber on Indian reservations by the Indians of the reservation, under Presidential regulations,[302] thus recognizing an Indian possessory right but leaving its extent still uncertain.

In a later opinion of the Attorney General, it was held that the Indian occupants of an Executive order reservation were entitled to the proceeds of timber sales.[303]

In the case of the Shoshone Indians v. United States,[304] the Court of Claims pointed out that the interpretation of the *Cook* case as denying the validity of the Indian interest in timber was unnecessary and unjustifiable. In the *Cook* case, it was pointed but, "The court decided that the members of the Oneida Tribe had *no* right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs." The court further declared:

> In that case two points were decided: first. it was decided by analogy to the law relating to the respective rights of life-tenant and remainder-man. that the Indians have no right to cut the timber on an Indian reservation for the purpose of sale only; that to do so is waste, and that the

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[294] 19 Wall. 591 (1873).

[295] 186 U. S. 279 (1902).

[296] Apparently the Interior Department toot the Position at this time that tribal timber might be sold by the Indian agent for tbe benefit of the tribe and that the tribe itself might give a valid permit for the cutting and marketing of timber. Sen. Ex. Doc. NO. 72. 40th Cong., 2d sess. vol. 2. July 6. 1868.

[297] AS was said in the case of *Starr* v. *Campbell*, 208 U. S. 527 (1908) involving timber on allotted lauds.

> It is alleged that the value of the land. exclusive of the timber, Is no more than $1,000; fifteen thousand dollars* worth of lumber has been cut from the land. The restraint upon alienation would be reduced to small consequence if it be confined to one-sixteenth of the value of the land and fifteen-sixteenths left to the unrestrained or unqualified disposition of the Indian. Such is not the legal effect of the patent. (P. 534.)

Accord: United States v. *Boyd*, *83* Fed. 547 (C. C. A. 4. 1897).

[298] *Op. cit.*, fn. *295.*

[299] Timber on Indian Reservations, 19 Op. A C. 194 (1888).

[300] Timber Unlawfully Cut on Indian Lands. 19 Op. A. G. 710 (1890).

[301] Letter from the Secretary of the Interior, House Ex. Doc. NO. 61, 43d Cong., 2d seas.. vol. 12. December 17. 1874. And cl. remarks of court in *United States* v. *Foster*, 25 Fed. Cas. No. 15141 (C. C. E. D., Wis. 1870):

> . . . while, perhaps. there may be some question whether the Indians would have the right to commit waste. properly so called, upon the land. or to use the timber for the purpose of speculation. still there can be no doubt they would have the right to clear the land for cultivation; and. if so. it would seem. to sell the wood thus obtained from the land; and to say that they could have the right to cut and use the wood and timber for these purposes. and that they could not sell it to enable them to obtain necessary articles, such as nails and other materials for the construction of their buildings and fences. would seem to be making a very refined distinction and one not warranted under the circumstances of the case.

[302] Act of February 16. 1889. 25 Stat. 673. 25 U. S. C. 196.

[303] Sales of Timber from Unallotted Lands of Indian Reservation, 29 Op. A. G. 239 (1911) (White Mountain Apache).

[304] 85 C. Cls. 331 (1937). aff'd 304 U. 8. 111 (1938).

title to timber so cut vests in the United States as the owner of the fee or "ultimate domain"; second, that the Indians have an exclusive right of use and occupancy of *unlimited duration*, and the right to cut the standing timber *during the whole period of such occupancy* not only for use upon the premises but "for the purpose of improving the land, or the better adapting it to convenient occupation"; also the right to sell all timber cut for the latter purpose. It is clear therefore that this decision did not hold that the government had the right to cut or dispose of the timber on Indian Reservations, or to sell Indian lands for its own use and benefit without accounting therefor to the Indian tribe. When a reservation is definitely set apart for an Indian tribe by treaty or statute, the Government has only the right and power to control and manage the property and affairs of the Indians in good faith for their betterment, but, as stated by the court in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564, 565, 566. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that would not be an exercise of guardianship, but an act of confiscation.' " *United States* v. *Creek Nation*, *supra*, p. 110, 113; . . .

Government counsel argue here that United *States v. Cook*, *supra*, decided that the interest of the Indians in the reservation lands and timber thereon is that of a life-tenant and no more. In that case the court did say that "What a tenant for life may do upon the lands of a 'remainder-man the Indians may do upon their reservations, but no more." But in thus comparing the position of the Indian with that of a life-tenant for the purpose of stating what the Indians may or may not do on their reservations, we think the court did not intend definitely 'to hold that the *interest* of the Indians in the lands of their reservations is only that of a tenant far life. Such a holding would have been in conflict. with the statement of the court after reviewing prior cases concerning the nature of Indian title, that the Indians have the right of use and occupancy of unlimited duration. We think also that the contention of counsel for defendant is inconsistent with the holding of the Supreme Court in the case at bar—that the power of the government to control and manage the property and affairs of the Indians in good faith for their betterment and welfare does not extend so far as to enable the government to give the land to others or to appropriate them to its own purposes. (Pp. 364–365.)

The decision of the Court of Claims. that the value of Shoshone lands taken by the Government must include the value Of the timber thereon, was upheld by the Supreme Court on appeal,[305] and confirmed in the later case *of United States* v. *Klamath Indians*.[306] Following this decision, Congress by special statute directed the Secretary of the Treasury to credit to the tribal funds of the Chippewa Indians the amount of the Judgment in the *Pine River Logging Co.* case, which had been erroneously deposited in the Treasury of the United States as public money, together with interest thereon.[307]

It must, therefore, be taken as settled law at the present time, that in the absence of specific language to the contrary the establishment of an Indian reservation for the use and occupancy of the Indians conveys to the Indians an interest in the timber of the reservation as complete as is the tribal interest in the land itself, that the cutting and alienation of such timber is subject to congressional legislation, and that the wrongful acts of individual Indians, vendees of timber, or agents of the United States Government. cannot 'deprive. an Indian tribe of its interest in tribal timber, or of its right to receive the proceeds of timber cut and alienated 'without the consent of the tribe.

These views are supported by the course of congressional legislation relating to timber growing on tribal land. Congress has repeatedly enacted special legislation authorizing disposition of timber on various designated reservations, providing always that the proceeds of such disposition should accrue to the benefit of the tribe concerned.[308]

Apart from these special statutes, Congress has enacted various laws of general application relating to the disposition of tribal timber, and providing that proceeds therefrom shall accrue to the benefit of the tribe concerned. Thus, section 7 of the Act of June 25, 1910,[309] reads:

> That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin. (P. 857.)

Again Congress, by the Act of July 3. 1926,[310] provided that the net proceeds derived from the sale of timber on Indian lands should be credited to the funds of the tribe.

Similarly. various treaties have recognized the Indian right in timber on tribal land by providing for payments to the Indian tribe where such timber was destroyed without tribal consent.[311] Many other treaties provide for the establishment of Indian sawmills, and this has been construed as evidencing an understanding that the Indians would own the timber on the reservation.[312]

Further recognition of. the possessory interest of an Indian tribe in the timber growing upon its land is found in statutory provisions reserving timber on allotted land for the benefit of the tribe,[313] or reserving tribal timberlands from sale. where other lands are offered for sale.[314]

The action of Congress in exercising a large measure of supervision, through the Department of the interior. over the disposition of Indian timber is no more a denial of the Indian

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[305] 304 U. S. 111 (1938). Commenting on the Cook case. the Supreme Court declared. *per* Butler. *J.* (Reed. *J.*, dissenting):

> *United States* v. *Cook*, *supra*, gives no support to the contention that In ascertaining Just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land. minerals or standing timber but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that. as against the purchaser from the wrongdoers. the United States was entitled to possession. It was not there declared that the tribe's ri t of occupancy in perpetuity did not include ownership of. the land or mineral deposits or standing timber upon the reservation. or that the tribe's right was the mere equivalent of. or like. the title of a life tenant. (P. 118.)

The argument contra is presented in a Memorandum of the Asst. Attorney General. dated December 8, 1937. 11 L. D. Memo. 468.

[306] 304 U. S. 119 (1938). In this case. the Court ruled:

> The clause declaring that the district retained should. until otherwise directed by the President, be set apart as a residence for the Indians and 'held and regarded as au Indian reservation" clearly did not detract from the tribes' right of occupancy. The worth attributable to the timber was a part of the value of the land upon which it was standing. (P. 123.)

[307] Act of June 15. 1938. 52 Stat. 688.

[308] Act of April 25, 1876. 19 Stat. 37 (Menomonee); Act of July 5. 1876. 19 Stat. 74 (Kansas Indians); Act of June 17. 1892. 27 Stat. 52 (Klamath River Indian Reservation); Act of April 23. 1904. sec. 11. 33 Stat. 302. 304 .(Flathead Indian Reservation): Act of June 5. 1906. 34 Stat. 213 (Kiowa. Comanche. and Apache): Act of March 23. 1908. 35 Stat. 51 (Menominee); Act of May 29. 1908. 35 Stat. 458 (Spokane).

[309] 36 Stat. 855. Sec. 27 of this act provides for the sate of pine timber on ceded Chippewa Indian Reservation in Minnesota. See also 25 U. s. c. A. 196.

[310] 44 Stat. 890.

[311] Art. 3 of Treaty of March 6. 1865. with Omaha Tribe. 14 Stat. 667; Art. 14 of Treaty of July 4. 1866. with the Delaware Tribe. 14 Stat. 793.

[312] *United States* v. *Sinnott*, 26 Fed 84 (C. C. Ore. 1886) (Grand Ronde)

[313] Act of February 25, 1920. 41 Stat. 452.

[314] Act of May 27. 1910. 36 Stat. 440 (Pine Ridge Indian Reservation); Act of May 30, 1910. 36 Stat. 448 (Rosebud Indian Reservation).

interest in such timber than is the equally large measure of control over alienation of Indian lands a denial of the Indian interest in such lands. On the contrary. the underlying purpose of such regulation, for many years, has been the protection Of the interests of the tribe as a whole against overaggressive individuals and generations heedless of posterity.[315] It is believed that the first federal law establishing the principle of sustained yield timber production was the Act of March 28, 1908,[316] relating to timber-cutting on the Menominee Reservation.

Federal control over the disposition of tribal timber applies even where the tribe concerned holds the land in fee simple,[317] which is a clear indication that limitations upon the disposition of Indian tribal timber are in no way inconsistent with a recognition that the full beneficial interest therein is vested in the Indian tribe.

The tribal possessory right in timber may be protected both by civil and by criminal proceedings. Actions in the nature of replevin [318] or trover [319] and injunction [320] suits have been brought by the United States, as already noted, where timber has been disposed of unlawfully. In addition, criminal sanctions have been applied.

Section 5388 of the Revised Statutes, making it an offense to' cut timber on lands of the United States reserved for military or other purposes, was apparently the only statute on the books that might be construed to make unlawful cutting of Indian tribal timber [321] a criminal offense, until June 4, 1888, when an amendment to this section was adopted which added to the section the words "or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States. [322] In 1909. this statute was incorporated, with slight verbal changes. in the Penal Code,[323] as section 50. The provision in question, as subsequently amended, reads : [324]

> SEC. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which. in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lauds belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shalt remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars. or imprisoned not more than one year, or both.[325]

The validity of federal penal legislation in this field appears to be beyond question,[326] and its applicability to individual members of the tribe that owns the timber has been maintained even in an extreme case where the court was forced to say:

> It is plain that by cutting trees on the reservation Konkapot brought himself within the letter of the section as amended. He did not. however, cut the trees for sale or profit. To occupy and cultivate the tract allotted to him in severalty be needed a house and barn, and the trees. were cut for the sole purpose of erecting such buildings upon his premises. It seems harsh to visit upon him the penalty of the statute for this act; but the court must administer the law as it finds it.[327]

[315] The Department of the Interior in General Forest Regulations dated April 23. 1936, 25 C. F. R. 61. states as among its objects the following:

> The preservation of Indian forest lands in a perpetually productive state by providing effective protection, preventing clear cutting of large contiguous areas. and making adequate provision for new forest growth when the mature timber is removed.

Regulation 9 provides for sale of timber only where the volume produced by the forest annually is in excess of that which is practicable of development by the Indians. or where the stand is rapidly deteriorating for various reasons. and then only after the timber to be sold has been inspected and the contract of sale approved.

[316] 35 Sat. 51. The question of whether the Department of the Interior has complied with this statute has been referred by Congress to the Court of Claims for determination Act of September 3. 1935. 49 Stat. 1085. amended by Act of April 8. 1938. 52 Stat. 208. *Cf. United States ex rel. Besaw* v. Work. 6 F. 2d 694 (App D C. 1925).

[317] *United States* v. *Boyd*, 83 Fed. 547 (C C. A 4. 1897).

[318] *United States* v. *Cook*, *supra*, fn. 294.

[319] *Pine River Logging Co.* v. *United States*, *supra*, fn. 295.

[320] *United States* v. *Boyd*, *supra*, fn. 317.

[321] See *United States* V. *Konkapot*, 43 Fed. 64, 65 (C. C. Wis. 1890).

[322] 25 Stat. 166.

[323] Act of March 4. 1909. 35 Stat. 1088. The Act of June 4, 1888, is included in the repealing clause. sec. 341.

[324] Act of June 25. 1910. sec. 6. 36 Stat. 855. 557.

[325] This section is made inapplicable to the Osage Indians and the Five Civilized Tribes by sec. 33 of the same act. Separate similar legislation relating to the Five Civilized Tribes is found in the Act Of June 6. 1900, 31 Stat. 660. as amended by the Act of January 21. 1903, 32 Stat. 774. See Op. Sol. I. D.. M 22121. April 12. 1927.

[326] *United States* v. *Kempf*, 171 Fed 1021 (D. C. E. D. Wis. 1909).

[327] *United States* v. *Konkapot*, 43 Fed. 64. 66 (C. C. Wis. 1890); Labadie v. United *States*, 6 Okla. 400 (1897). In the former case, the court held erroneous the conviction of a second Indian defendant who had removed and used tribal timber unlawfully Cut by the first defendant.

SECTION 16. TRIBAL WATER RIGHTS

Whether water rights inure to a tribe and to what extent is largely a matter of judicial interpretation. The early treaties with the Indians seldom mentioned and never defined water rights. And yet, since the Indian economy was built at that time in part on fishing and later on agriculture, it was essential that a tribe be assured some right to the water within or bordering the reservation.

That the Federal Government had the power to reserve the waters flowing through the territories and except them from appropriation under the state laws had early been decided.[328] Thus, when the question of tribal water right first arose the Supreme Court in the case of *Winters* v. *United States* [329] held that where land in territorial status was reserved by treaty to an Indian tribe, there was impliedly reserved for the Indians, and withheld from subsequent appropriation by others, water of the streams of the reservations necessary for the irrigation of their lands.

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a

[328] *United States* v. *Rio Grande Irrigation Co.*, 174 U S. 690 (1899); *United States* v. *Winans*, 198 U. S. 371 (1905) rev'g 73 Fed. 72 (C. C. Wash. 1896).

[329] 207 U. S. 564 (C. C. A. 9. 1908). Followed in *United States* v. Powers. 305 U. S. 527 (1939). aff'g. 94 F 2d 783 (C. C. A. 9. 1938). mod'g. 16 F. Supp 155 (D C Mont 1936); *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); *United* States v. *Parkins*, 18 F. 2d 643 (D. C. Wyo. 1926); *United States* v *Hibner*, 27 F. 2d 909, 911 (D. C. Idaho 1928); *United States* v *Cedarview* Irrigation *Co.* and *United States* v. Dry *Gulch* Irrigation *Co.* (Equity Nos. 4427 and 4418. D. C. Utah. 1923—unreported); United States v *Orr* Water *Ditch Co.* (Equity Docket A-3, D. C.. Nev. 1926—unreported); *United States* v. *Morrison Consol. Ditch* Co. (Equity No. 7736, D. C. Colo. 1931—unreported); *Anderson* v. *Spear-Morgan Livestock co*, 79 P. 2d 667 (Mont. 1938); *Conrad Inv. Co. V. United Stares.* 161 Fed. 829 (C. C. A. 9. 1908). aff'g 156 Fed. 123 (C. C. Mont. 1907); and compare *Skeem* v. *United States.* 273 Fed. 93 (C. C. A. 9. 1921); *Mason* v. Sums. 5 F. 2d 255 (D. C. W. D. Wash. 1925); but *cf. United States* v. *Wightman*, 230 Fed. 277 (D. C. Ariz. 1916); *Byers* v. *Wa-Wa-Ne*, 86 Ore. 617. 169 Pac. 121 (1917).