the exclusive method of. making grants or leases apparently worked no hardship.

A new 'situation, however, was created with the passage of the Act of March 3,. 1871,[440] prohibiting the execution of treaties with Indian tribes. The passage of this act blocked the only valid method of leasing land which existing legislation permitted.

There. is some evidence, in the statutes and decided cases, that invalid leases were made by various tribes before and after 1871 and that these leases, although denied legal validity, served the purposes of lessors and lessees.[441]

The first statutory breach in the general ban against tribal leasing appeared in a special act relating to the Seneca Indians, ratifying past invalid leases and authorizing new leases to be made by the authorities of the Seneca Nation in accordance with the laws and customs of that nation.[442]

Since February 19, 1875, the date of the Seneca leasing act, various other special acts have, provided for leases of tribal land of the Fort Peck,[443] Blackfeet,[444] Fort Belknap,[445] Kaw,[446] Crow.[447] Shoshone,[448] Spokane,[449] and Osage [450] reservations, the Five Civilized Tribes,[451] and Pueblos.[452]

The first general statutory authorization of tribal leasing is found in section 3 of. the Act of February 28, 1891,[453] which in its present code [454] form reads as follows:

> * * *. Where lands are occupied by Indians who 'have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of. such reservation may recommend, subject to the approval' of the Secretary of the Interior.

The Act of August 15, 1894 extended the foregoing authority as follows: [455]

> * * * the surplus lands. of any tribe may be leased for farming purposes by the council of such tribe under the same rules and regulations and for the same term of years as is now allowed in the case of leases for grazing purposes.

The foregoing two statutes are, at the present time, the sole statutes of general application [456] under which tribal lands may be leased for grazing or farming purposes, except insofar as such lands are capable of irrigation, in which event the Act of July 3, 1926,[457] applies. This act extends the permissible leasing period for irrigable lands to 10 years, declaring: [458]

> The unallotted irrigable lands on any Indian reservation may be leased for farming purposes for not to exceed ten years with the consent of the tribal council, business committee, or other authorized body representative of the Indians. under such rules and regulations as the Secretary of the Interior may prescribe.

Insofar as the Act of 1891 authorized mining leases on lands "occupied by Indians who have bought and paid far the same," it has been extended and amplified by four later statutes.[459]

(1) Section 26 of the Act of June 30, 1919,[460] later amended by the Act of March 3, 1921,[461] and the Act of December 16, 1926,[462] authorized the Secretary of the Interior to lease tribal lands within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming, for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals. The 1919 act, as was characteristic of acts relating to tribal property enacted at that time, made no provision for Indian consent to such leases. Leases made under this statute might be "for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior,

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[440] 16 Stat. 544, 566, R. S. § 2079, 25 U. S. C. 71.

[441] The existence of such invalid leases is discussed in the Rept. H Comm. Ind. Aff., No. 478 43d Cong., 1st sess., dated April 20, 1874, relating to the Seneca Indians of New York. In accordance with. this report there was subsequently enacted the Act of February 19, 1875. 18 &at. 330 ratifying earlier invalid leases. See also *Quigley v. Stephens,* 8 Ind. T. 265 (1900), aff'd 126 Fed. 148 (C. C. A. 8, 1903), in which leasing practices within the Indian Territory are discussed. In the case of *United States* v. *Rogers,* 23 Fed. 658 (D. C. W. D. Ark. 1885), in reaching the holding that certain Lands were "occupied" by the Cherokee Nation. for purposes of criminal jurisdiction, the Court described such "occupancy" in these terms:

> The evidence in this case shows that the Cherokee Nation bas constantly. and all the time since it obtained the outlet. Claimed it, and exercised acts of ownership and control over it. The nation has collected at different times a grazier's tax from white men who were grazing tl eir stock on it. Individual Indians nav gone on it and fenced up large tracts of land on the outlet. Dil ferent individual Indians have gone out and lived on it, and nov live on it. That since the passage of this law of January 6, 1883 the Cherokee Nation has leased to citizens of the United State for grazing purposes 6,000,000 acres of this outlet. That unde the provisions of the sixteenth article of the treaty of 1866 witl the United States, it has sold tracts of land on this outlet fo reservations to the Pawnees, Poncas, Nez Perces, Otoes, an Missouras. The very country where this alleged offense wa committed, was, at the time of its commission, leased to th cattlemen as a part of the 6,000,000-acre lease. That the Cherc kee Nation never has abandoned any part of the outlet excep what it has sold. It claims the title and possession of the outle and of that part of it where this alleged offense is shown to hav been committed. The United States, the grantor, has admitte its title to it. (P. 665.)

[442] See preceding fn. 441. The Act of February 19. 1875, was amplified by the Act of September 30, 1890. 26 Stat. 558. and extended to cover additional particular cases by the Act of February 27, 1901, 31 Stat. 816; 'the Act of May 29. 1908, sec. 4. 35 Stat. 444. 445. and the Act of February 21. 1911. 36 Stat. 927. See also the Act of February 28, 1901, 31 Stat, 819, requiring payment of rentals to the United States agent for transmittal to tribal officers, in part, and in part to the heads of families of the Seneca Nation.

[443] Act of September 20. 1922, 42 Stat. 857: 25 U. S. C. 400 (mining leases on Fort Peck and Blackfeet Reservations).

[444] *Ibid.*

[445] Act of March 3. 1921. 41 Stat. 1355 (tribal leases of minerals and water power on Fort Belknap Reservation).

[446] Act of April 28. 1924. 43 Stat. 111; 25 U. S. C. 401 (mining leases on Kaw Reservation).

Act of February 28, 1891, 26 Stat. 794 (tribal permits, approved by tribal council).

[447] Act of June 4. 1920, 41 Stat. 751 (mining leases on Crow Reservation, approved by tribal council).

[448] Act of August 21. 1916. 39 Stat. 519 (20-year oil and gas leases on Shoshone Reservation, Wyo.).

[449] Act of May 18. 1916. 39 Stat. 155 (25-year mining leases on Spokane Reservation).

[450] Act of June 28, 1906. 34 Stat. 539 (tribal leases of oil, gas, and minerals on Osage Reservation). Act of March 3. 1921. 41 Stat. 1249; Act of March 2. 1929. 45 Stat. 1478. See Chapter 23.

[451] Act of August 7, 1882, 22 Stat. 349 (tribal leases of salt deposits in Cherokee Nation). Act of October 1, 1890, 26 Stat. 640 (giving the assent of the United States to coal leases on lauds of the Choctaw Nation). The Act of June 28, 1898. 30 Stat. 495 terminates the making of tribal leases in the Indian Territory (sec. 23), grants power to the Secretary of the Interior to lease tribal minerals (sec. 13), provides for the deposit of rentals in the United States Treasury for the benefit of the 'tribe (sec. 16), and protects lessees under prior leases executed by individual occupants of tribal land (sec. 23). For other acts, see Chapter 23.

[452] Sec. 17 of the Pueblo Lands Act of June 7, 1924. 43 Stat. 636, provides that no lease made by any pueblo "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

[453] 26 Stat. 795.

[454] 25 U. S. c. 397.

[455] Act of August 15, 1894, sec. 1, 28 Stat. 305, 25 U. S. C., 402.

[456] For special statutes, see footnotes 442-452, *supra.*

[457] 44 Stat. 394, U. S. C. -A. 402a.

[458] The leasing powers of incorporated tribes are discussed *infra.* For general grazing regulations see 25 C. F. R. 71.1–71.26. For regulations regarding grazing on the Navajo and Hopi Reservations, see 25 C. F. R. 72.1–72.13.

[459] For regulations relating to leasing of tribal lands for mining, see 25 C. F. R. 186.1–186.30.

[460] 41 Stat. 3, 31.

[461] Sec. 1, 41 Stat. 1225. 1231.

[462] 44 Stat. 922, 25 U. S. C. 399.

unless otherwise provided by law at the time of the expiration of Such periods."

The 1919 act in effect extended to Indian reservations in the named states the procedure of exploration and discovery then in force on the public domain.

(2) A second extension of the law authorizing mineral leases on tribal land was brought about by the Act of May 29, 1924,[465] which provided that unallotted land on Indian reservations, other than lands of the Five Civilized Tribes and the Osage Reservation, subject to lease for mining purposes under the 1891 act, might be "leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities . . . "

(3) Secretarial authority to make mineral leases on tribal land was extended by the Act of April 17, 1926,[466] to cover lands "on any Indian reservation reserved for Indian agency or school purposes, in accordance with existing law applicable to other lands in such reservation." A royalty of at least one-eighth was to be reserved in all such leases, and the proceeds were to be deposited to the credit of the Indian tribe.

(4) The next statute on the subject of mineral leases was the Act of March 3, 1927,[467] which related to Executive order reservations, not covered by the 1891 act. and made special provision for oil and gas leases, in the following terms : [468]

> Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title.[467]

The foregoing statutes left the law governing mineral leases on tribal land in a patch-work state. This condition was remedied on May 11, 1938, by the enactment of comprehensive legislation governing the leasing of tribal lands for mining purposes. This legislation was advocated by the Secretary of the Interior in a letter to the Speaker of the House of Representatives dated June 17, 1937. As this letter was presented by the House Committee on Indian Affairs recommending the proposed legislation as the basis of its recommendation, it throws considerable light on the problems intended to be met by the above act.[468]

[463] 43 Stat. 244. 25 U. S. C. 398.

[464] 44 stat. 300. 25 U. s. C. 400a.

[465] 44 Stat. 1347. 25 u. S. c. 398a.

[466] 25 U. S. C. 398a.

[467] Other sections of this act relate to disposition of rentals (sec. 2. 25 U. S. C. 398b), taxes (sec. 3. 25 U. S C. 398c), changes In reservation boundaries (sec. 4. 25 U. S. C. 398d). and prospecting permits (sec. 5. 25 U. s. C. 398e).

[468]

DEPARTMENT OF THE INTERIOR,
Washington, June *17, 1937.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

MY DEAR MR. SPEAKER : I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

Under section 26 of the Act of June 30. 1919 (41 Stat. 31). as amended. leases for minerals other than oil and gas may be made on any reservation in the States of Arizona. Cnllfornla, Idaho, Montana. Nevada. New Mexico. Oregon. Washington. or Wyoming. Under the provisions of section 3 of the Act of February 28. 1891 (29 Stat. 78.51. as amended May 29. 1924 (43 Stat. 244). leases for oil. gas and other minerals may be made with the consent of the tribal council *on treaty reservations* in all States. Section 16 of the Indian Reorganization Act. approved June 18. 1934 (46 Stat. 984). provides that organized Indian tribes shall have the power to Prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of Incorporation issue are empowered lease their lands for periods of not more than ten years.

at Present no law under which Executive order lands may be leased for mining. outside of the States mentioned in the act of June 30. 1919. except for oil and gas mining purposes. unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the purposes of the legislation now proposed. therefore. is to obtain uniformity as far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The Act of June 30. 1919 requires the formal opening of lands for prospecting, location, and lease. by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws. file formal location notice: and under the regulations he must have the lands surveyed if they have not already been surveyed, all In accordance with the mining laws applicable to the public domain. This frequently results in long delay and is ofteo quite an expense to an applicant for a lease. Frequently we have requests for leases for the purpose of removing -sand and gravel for road grading purposes, or for the quarrying of stone. either for building or ging purposes in connection with which there would be little or no underSurface workings. In such cases. applicants for leases are required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than they care to undertake although the material desired may be very conveniently located and could be profitnbly utilized and consequently the opportunity to lease the land is lost and the revenue; while -perhaps not a great deal in a particular instance would amount to considerable in such cases through the entire Indian Service.

Section 26 of the Act of June 30, 1919. *supra*, as amended by the Acts of March 3. 1921 (41 Sat. 1231) and December 16, 1926 (44 Stat. 922–923), places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of the Interior has no discretion under the said section In the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder: and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to loaning the lands. In other words, under that law. neither this Department nor the Indian Tribal Council is In a position to prevent the acquisition of a lease after the lands have been declared open to Prospecting and, lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States: but there are disadvantages in following this procedure on Indian lands that are not Present in applying for a claim on the public domain. For instance. on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the Art of June 30. 1919. he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change Is in the Interest of leasing deposits of building stone. sand gravel and metalliferous minerals. For Instance the well-known Iron deposit on the Fort Apache Indian Reservation, outcropping alone the canyon wall for a distance of about 2 miles and 20 feet thick. with on estimated ore reserve of over 15 million tons. now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of Iron ore back from the face of the cliff. This deposit. it Is believed, could he leased to better advantage at public auction and In definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease. through tying up the land with a long strip 600 feet wide. This deposit of iron ore is about 20 miles from a railroad, and anyone interested and considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act which has very limited application The presence of coal is usually known by geological association. and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake. Nevada. can be seen for a distance of many miles Yet they must be "discovered" and "located" in accordance with the provisions of law relating to placer mining claims and leased to the person who erects monuments thereon. Deposits of sand. gravel and building stone are now similarly leased. even though the deposits are well known and could he leased with greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would he a more satisfactory law for the leasing of Indian lands for general mining Purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act. and I recommend that it be enacted.

The Acting Director of the Bureau of the Budget has advised that there Is no objection to the presentation of this report to the Congress.

Sincerely Yours,

CHARLES WEST,
Acting *Secretary of the Interior.*

Section 1 of the Act of May 11. 1938,[469] lays down a comprehensive law covering mineral leases on unallotted land, in the following *terms* :

> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band Of In-

[469] 52 Stat. 347. 25 U. S. C. 396a.

dians under Federal; jurisdiction except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as, long thereafter as minerals are produced in paying quantities.

Section 2 of the act (25 U. S. C. 396b) provides for public auction of oil and gas leases and safeguards the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934,[470] "to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934." Section 3 of the act (25 U. S. C. 396c) specifies the type of bond to be furnished by lessees. Section 4 of the act (25 U. S. C. 396d) authorizes the Secretary of the Interior to promulgate regulations for the enforcement of the act. Section 5 (25 U. S. C. 396e) authorizes the Secretary of the Interior to delegate to subordinate officials power to approve leases. Section 6 of the act (25 U. S. C. 396f) provides that the act shall not apply to the "Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." [471]

The 1891, 1894, and 1938 acts cover mining leases on all reservations and also grazing [472] and farming leases on lands "bought and paid for" by Indians. There is no comprehensive legislation authorizing agricultural and grazing leases on lands which the Indians never "bought and paid for," e. *g.*, lands held by aboriginal occupancy recognized by treaty. There is no general statute authorizing timber leases, but timber sales, which serve the purpose of leases, are made pursuant to section 7 of the Act of June 25, 1910.[473] Neither is there any general legislation authorizing leases for purposes other than farming, grazing, and mining.[474] This does not mean, of course, that tribal lands have not been utilized by third parties, under permits or under invalid tribal leases, for many other purposes, such as trading posts, power sites, summer cottages, and ordinary commercial development. The character of such use will be further considered in connection with the problem of invalid leases and the problem of tribal licenses or permits. For the present it is enough to point to the large gaps in the existing law governing tribal leases, gaps which, it may be hoped, Congress will soon cover.

For those Indian tribes within the scope of the Act of June 18, 1934; these gaps are largely covered by section 17 of that act, which provides that the Secretary of the Interior may issue a charter of incorporation to any tribe applying therefor, which charter may convey comprehensive power to manage and dispose of tribal property subject to the proviso that tribal land within the limits of the reservation may not be leased for periods exceeding 10 years. Such charter provisions may or may not provide for departmental approval of tribal leases. Most charters provide for a trial period during which all tribal leases are subject to departmental approval, to be followed by free tribal leasing within the limits prescribed by the act and the particular charter.[475]

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[470] 48 Stat. 984, 986.

[471] Special statutes govern the exempted reservations. See fns. 463, 464, 466, *supra*. On Osage and Choctaw-Chickasaw lands. See Chapter 23. The Papago Reservation in Arizona was created by Executive order on February 1. 1917. The order provided that the mineral lands within the reservation should be open for exploration. location, and patent under the general mining laws of the United States. The subsequent acts of Congress enlarging and extending the boundaries of the Papago Reservation have provided that the lands added thereto should be subject to the proviso of the Executive order concerning mineral entries. Act of February 21, 1931. 46 Stat. 1202; Act of July 28, 1937, 50 Stat. 536; *see also* Op. Sol. I. D.. M.28183, October 16, 1935. Since mineral lands of the Papago Reservation ace subject to disposition as pact of the public domain, the tribe Cannot lease them.

[472] For *grazing* regulations see 25 C. A. R. 71.1-72.13. For leasing of Indian-lands for farming, grazing and business purposes, see 25 C. F. R. 171.1-171.36.

[473] "The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold Under regulations to be Peescribed by the Secretary of the Interior. and the proceeds from such ales 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." (25 U. S. C. 407. 36 Stat. 857.) *Cf.* Act of February 16. 1889. 25 Stat. 673. 25 U. S. C. 196, *discussed in sec.* 15, *supra;* and see Act of March 4. 1913, 37 Stat. 1015, 16 U. S. C. 615 (authorizing sale of burnt timber on "public domain" and specifying that the proceeds from the sale of burnt timber on lands appropriated to an Indian tribe shall be transferred to the fund of such tribe. On the power of the Secretary to modify timber contracts, see Chapter 5.

[474] But see 25 C. F. R. 171.1, 171.12.

[475] The Corporate Charter of the Minnesota Chippewa Tribe, issued by the Secretary of the Interior on September 17, 1937, and ratified by vote of the tribe (1,480 for and 610 against) on November 13, 1937, contains the following provisions on the leasing of tribal lands and the termination of departmental supervisory powers over such leases :

> 5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-Laws of the said tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the Tribal Constitution and By-Laws :
>
> • • • (b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations :
>
> • • • (3) No leases, permits (which terms Shall not include land assignments to members of the Tribe) or timber Sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of any reservation Of the Minnesota Chippewa Tribe shall be made by the Tribe for a longer term than ten years, and all such leases and permits, except to members of the Tribe. and all such contracts must be approved by the Secretary of the Interior or by his duly authorized representative; • • •
>
> 6. Upon the request of the Tribal Executive Committee for the termination of any supervisory power reserved to the Secretary of the Interior under sections 5 (b) 3, 5 (c). 5 (d). 5 (f). 5 (g). 5 (h), and section 8 of. this Charter, the Secretary of the Interior, if he shall approve such request, shall thereupon submit the question of such termination to the tribe for referendum. The termination shall be effective upon ratification by a majority vote at an election in which at least thirty per cent of the adult members of the Tribe residing on the reservations of the Minnesota Chippewa Tribe shall vote. If at any time after ten years from the effective date of this Charter. such request shall be made and the Secretary shall disapprove it or fail to approve or disapprove it within ninety days after its receipt, the question of the termination of any such power may then be submitted by the Secretary of the Interior or by the Tribal Executive Committee to popular referendum of the adult members of the Tribe actually living within the reservations of the Minnesota Chipppewa Tribe and if the termination is approved by two-thirds of the eligible voters, shall be effective.

A Similar provision, without the 10-year minimum for Continued supervision, is found in the Corporate Charter of the Fort Belknap Indian Community, issued by the Secretary of the Interior on July 29, 1937, and ratified by the Indian community on August 25. 1937.

An alternative form of charter. under which supervision terminates automatically, after a specified period. has been issued to a number of Oklahoma tribes. under the Act of June 26. 1936 (49 Stat. 1967; U. S. Code Title 25, sec. 503). A typical charter. that of the Kickapoo Tribe, issued by the Secretary of the Interior on December 11. 1937. and ratified by vote of the tribe on January 18, 1938, contains the following provisions :

> 3. The Kickapoo Tribe of Oklahoma. subject to any restrictions contained in the Constitution and laws of the United States or In the Constitution and By-Laws of the Tribe. and subject to the limitations of Sections 4 and 5 of this Charter, shall have the following corporate powers as provided by Section 3 of the Oklahoma Indian Welfare Act of June 26. 1936.
>
> • • • • •
>
> (g) To purchase, take by gift, bequest or otherwise, own hold, manage, operate, and dispose of property of every description, real or personal.
>
> • • • • •
>
> 4. The foregoing corporate powers shall be subject to the following limitations :
>
> • • • •
>
> (b) No tribal land or interest in Land shall be leased for a longer period than ten years. except that oil. gas. or mineral leases may be made for longer periods when authorized by law.
>
> • • • •

Tribal constitutions adopted pursuant to section 16 of the act must be distinguished from charters issued pursuant to section 17. The former determine, primarily, the manner in which the tribe shall exercise powers based upon existing law, and leasing provisions in tribal constitutions are therefore to be read in the light of existing law; tribal charters, on the other hand, involve new grants of power, and leasing provisions are therefore not limited by prior law.[475]

Where a tribe has the power to execute a corporate lease, there are administrative determinations to the effect that ministerial details in the execution of such power may be delegated by the corporate authorities to a federal employee but that general responsibility for the execution of such leases and for fixing the terms thereof cannot be transferred to such an employee.[477]

Under the foregoing statutes it will be seen that the character of tribal ownership is, generally speaking, irrelevant to the question of whether the tribe may lease tribal lands. An exception to this general rule must be made respecting the Act of February 28, 1891,[478] which is limited to lands bought and paid for" by the Indians,[479] and note should be taken of the early view, now superseded,[480] that Pueblo leases are not subject to departmental control.[481]

Within the limits fixed by acts of Congress and regulations issued pursuant thereto, the tribe may specify the terms upon which it will lease land. Thus -where improvements for Indian rehabilitation are placed upon tribal land under the Emergency Appropriation Act of April 8, 1935,[482] the tribe may rent such improved lands to needy members and provide that rentals shall be impressed with a trust for a particular purpose.[483]

Congressional power over the leasing of tribal lands includes the power of controlling the receipts therefrom. It has been held that the tribal interest in rentals is subject to the same measure of plenary congressional control as is the tribal interest. in land itself, so that a statute conveying the tribal interest in minerals to allottees raises no serious question of constitutionality and no reasonable basis for a suit by the tribe against the mineral lessees.[484] Conversely, where minerals are reserved to a tribe for a given period, with provision that they shall belong to the allottee. thereafter, an extension of this period of tribal interest is not unconstitutional and tribal leases, (thereafter executed have been sustained as valid.[485]

Whatever its power over outstanding tribal leases may be, Congress has in certain casesprovided that such outstanding leases shall continue in force despite the allotment of the land leased.[486] The present practice appears to be to include in tribal leases. a provision permitting their termination in the event of the allotment of the land leased.

The execution of tribal leases which are not authorized by any existing federal law raises a series of difficult problems as to the legal rights of lessors, lessees, and. third- parties. The statute which denies legal validity to a lease not made "by treaty or convention entered into pursuant to the constitution" does not prohibit the execution of such a lease, and although the statute imposes a penalty upon private persons who, without legal authority, attempt to negotiate such treaties or conventions or otherwise "treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, it has been held that this language does not make it an offense to execute, accept or negotiate for an unauthorized lease. This issue was squarely raised in the case of *United* States v. *Hunter*,[487] which was an action to recover the statutory penalty of $1,000 for an alleged violation, by a lessee of the Cherokee Nation, of Revised Statutes, section 2116. The court offered the following interpretation of the prohibitory language of this section:

> Obviously, it contemplates the casting of a penalty upon one who assumes to act for the United States, and, usurping an authority which he does not possess, attempts to negotiate a national compact or treaty with an Indian nation. But there is another clause in the sentence which renders the question of more doubt; that denounces the penalty on every person who attempts to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed. This seems to refer to an attempt, by private contract and personal arrangement, to obtain the lands of an Indian nation. But what kind of a private contract is denounced? The description is not as broad as in the first sentence, for there it speaks of purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, while here it is for "*the title* or purchase of any lands." Does this include a mere lease for grazing purposes? I think not. A leasehold interest may be considered, for some purposes, a title, and sometimes the word "title" is used in a general sense so as to include any title or interest, and thus a mere leasehold interest; but here it is *the title*, and this, in common acceptance, means the full and absolute title: for when we speak of a man as having title to certain lands. the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee; and, this being a penal statute, no extended, no strained construction should be put upon the words used in order to include acts not within their plain and ordinary significance. That this is the true construction is sustained by the section immediately following. which reads:
>
> > "Every person who drives or otherwise conveys any stock, or horses, mules, or cattle, to range and feed on any lands belonging to any Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."
>
> This imposes a penalty on any one who, *without* the *consent* of an Indian tribe drives his stock to range and feed on the lands of such tribe. This implies that an

5. Until ten years from the date of ratification of this Charter. or such other date as may be fixed pursuant to Section 6. the following corporate acts or transactions shall be valid onl after approval by the Secretary of the Interior or his duly auth orized representative:

(d) Any lease. grazing permit. or other contract affecting tribal land. tribal minerals. or other tribal interests in land

6. At any time within ten years after the ratification of this Charter. any power of review established by Section 5 may be terminated by the Secretary of the Interior with the consent of the Kickapoo Council. At or before the ex iration of this ten-year period. the Secretary may purpose a furth er extension of this period. Such proposed extension shall be effective unless disapproved by a three-fourths vote of the Kickapoo Council.

[476] Memo. Sol. I. D., January 12, 1937. and Memo. Sol. I. D.. December 11, 1937 (holding that a statutory requirement of Secretarial approval for tribal leases applies to tribe organized under see. 16, but not to tribe incorporated under see. 17).

[477] n Memo. Sol. I. D., September 11. 1937 ; Memo. Sol. I. D.. December *22. 1938.*

[478] *26* stat.. *795.*

[479] It has been held by Assistant Attorney General, later Justice, Van Devanter that in order to bring land within the statutory category of "lands bought and paid for by the Indians," cash payment was not necessary. and that an exchange of other lands for other valuable consideration sufficed. Uintah Lands. 25 L. D. 408 (1897). Accord: Straw*berry Valley Cattle* Co. v. *Chipman,* 45 Pac. 348 (1896).

[480] *United States* v. *Candelaria,* 271 U. S. 432 (1926). *And* se Chapter 20.

[481] *19* L. D. 326 (1894).

[482] 49 Stat. 115. See Presidential Letter No. 1323-1. dated January 11, 1936, allocating emergency funds for "the rehabilitation of Indians i stricken rural agricultural areas."

[483] Op. Sol. I. D.. M.28316, March 18, 1936.

[484] Attorney's Contract to Represent The Seminole Nation, 35 Op. A. G. 421 (1928).

[485] *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. Some later statutes seek to eliminate doubts on this point by expressly reserving to Congress the right to extend the period of tribal mineral ownership. Act of March 3. 1921. 41 Stat. 1355 (Fort Belknap).

[486] Act of June 4. 1920. 41 Stat. 751 (Crow) ; Act of March 3. 1921, 41 Stat. 1355 (Fort Belknap).

[487] 21 Bed. 815 (C. C. E D. Mo. 1884).

> Indian tribe 'may consent to the use of their lands for grazing purposes, or, at least, that if it does consent no penalty attaches; and, if the tribe may so consent, it may express such consent in writing, and for at least any brief and reasonable time. It' was said by counsel for the government that if a lease for five years can be sustained, so may one for 999 years, and thus 'the Indian tribe be actually dispossessed of its lands. But, as was stated in the opening of the opinion, the question here is not as to the validity of a lease, long or short, but as to whether this penal statute reaches to, the mere inducing or negotiating of the lease. For the reasons I have thus given, it seems to me that it cannot be so interpreted; and whatever may be the fact as to the validity of such a lease, and entering into no, discussion as to how far it is binding On the Indian 'nation, or whether it could be set aside at the option of the nation or by the action of the national government, I am of the opinion that the acts charged upon the defendant are not within the scope of this penal statute. (Pp. 617–618.)

Under this analysis it would appear that the execution by tribal authorities of a lease covering tribal land may lead to the same consequences as the execution of a lease by an infant, a lunatic. or a person under guardianship. The lease cannot be enforced, but the execution of the lease is not an offense, and valid rights may accrue under the lease.

Thus, it was held, in *Lemmon* v. *United States*,[488] that the United States could not recover rentals under an approved lease if rent hadalready been paid under an invalid lease. The court declared, *per* Circuit Judge (later Justice) Sanborn:

> * * * it is conceded on all hands that Robert H. Ashley, the United States Indian agent, had authority to collect the rents for these premises. and if, by his direction, the lessees under the invalid leases paid the rent to a representative of the Winnebago tribe of Indians, who accepted and distributed it, with Ashley's knowledge and consent, among those Indians, the government would undoubtedly be estopped from again collecting rent for the same premises of one who never had occupied them, and to whom it never delivered possession under its lease. The Winnebago tribe of Indians and its members were the cestuis que trustent of the government. They were the parties entitled to these rents. If by the direction of the trustee the rents were collected by a representative of the cestuis que trustent, and distributed with the consent of the trustee among the cestuis que trustent, it is difficult to perceive how the trustee can again collect the rents. All this rejected evidence was competent, pregnant, and persuasive upon the issue whether the Flournoy Company and Nick Fritz, who occupied during the term of the Lemmon lease, held under her or under their old leases from the Winnebago tribe of Indians, and it should have been received. (P. 653.)

A lease, although invalid, may be sufficient to bar a trespass action against the lessee under Revised Statutes, section 2117, above discussed.[489] Likewise a lessee under a void lease may justify his possession to the point of enjoining a trespasser.[490] Likewise, it has been held by a state court that the lessee under an invalid tribal lease may execute a binding agreement, amounting to a sublease, with a third party and may recover on a note given by such third party as consideration, in accordance with the principle that a lessee may not question the title of his lessor.[491] It has also been held in at least one state case.[492] that the holder of an invalid tribal lease may recover upon a contract for the pasturage of cattle upon the land so leased. On: the other hand, there are some state cases holding that an Indian tribe cannot recover rental under a void lease (although it is intimated that a *quantum meruit* recovery may be had),[493] and that a lessee under such a lease who is not in actual possession of the land leased, cannot secure possession of crops grown thereon.[494]

The foregoing decisions leave many gaps in a definition of the rights: of lessors, lessees, and' third parties under an invalid lease. These questions, however, are not peculiar to Indian law, and courts will probably answer them, as they arise, by reference to analogies in the general field of landlord and tenant relations. Such analogies, however, must be used cautiously, in view of the fundamental principle that, in matters affecting tribal affairs, where Congress is silent the law of the tribe rather than the law of the state must prevail.[495] In accordance with this principle, it has been held that the effect of a lease of tribal land must be determined in accordance with the statutes and judicial decisions of the tribe. Thus, in *Oolagah Coal* Co. v. *McCaleb*,[496] where the plaintiff company, operating under -an instrument which, though called a "mineral license," apparently amounted to a "lease," sought an injunction against a trespasser,-the court declared, *per* Thayer, *J.*:

> The bill averred * * * that the Cherokee Nation had theretofore lawfully issued five mineral licenses, pursuant to the laws of the Nation, to certain licensees therein named, which licenses conferred on said licensees the exclusive right to mine and sell coal on the various tracts of land described in said licenses. * * * that all of the licenses aforesaid were assigned by. and that the assignment thereof were obtained from, the licensees, by the plaintiff company. in accordance with the laws of the Nation. * * * From any point of view, we think that the bill stated a case entitling the plaintiff to *some measure* of equitable relief. It showed * * * that the plaintiff company had an exclusive right to mine coal on the lands in question * * *. (Pp. 87–89.)

Furthermore, it has been held that the judgment of a tribal court on the validity of a lease involving a member of the tribe, the tribe itself, and a nonmember is *res judicata* and will not be reexamined in a court of the United States.[497]

In the case of *Barbee* v. Shannon [498] the court declared:

> Much of the testimony in the record goes to show that the lease from the Creek Nation under which appellants claim is illegal because not made in compliance with the Creek laws upon the subject, and because the grant was in excess of the authority of the principal chief. The judgment of the Creek court precludes our consideration of these questions. We cannot review errors of law or practice in such courts, when their judgments are presented to us, unless such errors are jurisdictional. (P. 210.)

Moreover, it has been held that agents of the United States are without authority to remove as trespassers Persons holding under an allegedly invalid lease. Thus, in the case of *Quigley* v. *Stephens*,[499] an Indian agent sought to determine a controversy

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[488] 106 Fed. 650 (C. C. A. 8. 1901).

[489] 18 Op. A. G. 235 (1885).

[490] *Oolagah Coal Co.* v. *McCaleb*, 68 Fed. 86 (C. C. A. 8. 1895). While the opinion in this case refers to a "mineral license" rather than a "lease," it refers to the "estate" created by the transaction, which indicates that the instrument was a lease rather than a license.

[491] *Cherokee Strip Livestock Assn.* v. *Cass L. & C. Co.*, 138 Mo. 394, 40 S. w. 107 (1897).

[492] *Kansas & N. M. Land & Cattle Co. v. Thompson*, 57 Kans. 792. 791, 48 Pac. 34 (1897):

> Conceding that Thompson had at no time a right. as against the Indians or the government of the United States, to Continue in the occupancy of the land, if he was there with the consent of the Indians, and in fact rendered the service to the defendant of caring for and feeding its cattle, he was entitled to compensation therefor.

[493] *Mayes* v. *Cherokee Strip Livestock Association*, 58 Kans. 712, 51 Pac. 215 (1897); and *cf. Light* v. *Conover*, 10 Okla. 732, 63 Pac. 966 (1901) (holding that an individual Indian attempting to lease tribal land cannot recover agreed rentals under the invalid lease); *Langford* v. *Monteith*, 1 Idaho 612 (1876), aff'd. 102 U. S. 145 (1880) (holding that white man attempting to lease tribal land cannot recover rentals); *Uhlig* v. *Garrison*, 2 Dak. 71, 2 N. W. 253 (1878) (holding that white man attempting to lease tribal land cannot recover in ejectment).

[494] *Ooey* v. *Low*, *36* Wash. 10. 77 Pac. 1077 (1904).

[495] See Chapter 7.

[496] 68 Fed. 86 (C. C A. 8, 1895).

[497] *Barbee* v. *Shannon*, 1 Ind. T. 199, 40 S. W. 584 (1897).

[498] *Ibid.*

[499] 3 Ind. T. 265 (1900), aff'd. 126 Fed. 148 (C. C. A. 8, 1903).

as to the validity of a lease of tribal land executed by the owner of improvements thereon, and, reaching the conclusion that the lease was invalid, ordered the removal of the lessee. In a suit in ejectment which the alleged lessee then brought in the United States Court for the Northern District of the Indian Territory. it was held that the action of the agent was without legal authority or justification. The court declared:

> But whether the deed was void or valid. the rights of the parties to it, its construction, the disposition of. the properties acquired udder it, and the law and the equities of. the case, cannot be passed upon or enforced by an Indian agent. The courts alone possess these powers. The Indian agent complains in his decree. "that, if this rule were to prevail, noncitizens could take possession of the country, and practically control the tribes by connivance with their citizens." Whether this be issue or not, the fact is—and It is one of common knowledge—that nine-tenths of the farms of the Indian Territory have been opened up and made valuable by contracts substantially like this, and the Indian owners have been the direct beneficiaries. The courts here, without passing upon- the' validity Of such contracts, have universally held that, until the improvements provided for in the contract were paid for, the Indian lessor was estopped to set up the invalidity of the lease; and recently, in harmony with these decisions. by act of Congress (the Curtis bill—Ind. T. Ann. St. 1899, §§ 57q–57z91) it is provided that the lessee shall not be ejected until he shall have been paid for his improvements. We hold that the Indian agent had no Jurisdiction to try this case, and, therefore, when, at the instance of the appellee, he, using his police for that purpose, forcibly ejected the appellant from the premises; and put the appellee in possession, all the parties to the' transaction—the appellees as well as the Indian police, who is made a party to this suit-were guilty of au act of forcible entry, and that, therefore, the court below erred in instructing the jury to find their verdict for the appellees. The judgment of the court below is reversed, and the cause remanded. (P. 274)

Whether the foregoing decisions represent sound law may be open to discussion. They raise fundamentally 'a question that goes beyond the scope of Indian law and revolves about the principle that a lessee may not question the title of his lessor.[500] We may, however, in the following section on "Tribal Licenses," obtain some further light on the situation created by legally unauthorized tribal leases.

Whatever else these Cases may show, they do indicate that a tease made by a tribe to a member of the tribe, being justiciable only in the courts of the tribe, may be valid under those 'laws although null and void under federal or slate law. Such a view seems to have been implicitly accepted with respect to leases to tribal members in a number of decisions[501] and in a rather extensive administrative practice.

[500] See 1 Tiffany, Landlord and Tenant (1910). §§ 21, 182.

[501] *United States* v. *Rogers*, 23 Fed. 658 (D. C. W. D. Ark. 1885); *United States* v. *Foster*, 25 Fed. Cas. No. 15141 (C. C. E. D. Wis. 1870); and see case cited *supra*, tn. 497.

SECTION 20. TRIBAL LICENSES

That an Indian tribe may grant permission to third parties to enter upon tribal land, and may impose such conditions as it deems desirable upon such permission, is a proposition that has been repeatedly affirmed by the Attorney General. Perhaps the most persuasive of the opinions on this issue is that rendered by Acting Attorney General Phillips in 1884.[502] Three years earlier, the validity of the permit laws of the Choctaws and Chickasaws had been upheld in a formal opinion of the Attorney General. and the Interior Department had been advised that its activities in removing intruders should follow the definition of "intruders" provided by tribal law.[503] In 1884, a reconsideration of the question was asked "in consequence of earnest protest against that opinion from among the people of the two nations concerned—the *more* because such protest is in accordance with the judgments of some members of Congress and other prominent gentlemen from the States adjoining." The Attorney General declared :

> In the absence of a treaty or statute. it seems that the power of the nation thus to regulate its own rights of *occupancy*, and to say who shall participate therein and upon what conditions, cannot be doubted. The clear result of all the cases, as restated in 95 United States Reports. at page 526. is. "the right of the Indians to their occupancy is as sacred as that of the United States to the fee."
>
> I add, that so far as the United States recognize political organizations amongst Indians the right of occupancy is a right in *the tribe or nation.* it is of course competent for the United States to disregard such organizations and treat Indians individually but their policy has generally been otherwise. In such cases presumptively they remit all question of individual right to the definition of the nation. as being purely *domestic* in character. The practical importance here of this proposition is that In the absence of express contradictory provisions by treaty. or by statutes of the United States. the nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what regulations and conditions. (P. 36.)

Finding no statute or treaty provision compelling variance from this rule. the Attorney General upheld the validity of the tribal laws in question. In answer to a second question put by the Interior Department "whether, supposing these laws to be valid, the United States, through the proper Department, have power to revise them so as to secure reasonableness in the amount of the fees which they require from persons who apply for permits." the Attorney General held:

> In conclusion I have to say, that my attention has not been called to any statute by which Congress has delegated to a Department or officer of the United States its power to control such taxation. I therefore conclude that no Department or officer has such power. (P. 39.)

While a tribe may thus issue and condition a permit covering entry upon tribal land, it cannot (any more than could a state) grant an exclusive permit which would interfere with interstate commerce and thus trespass upon a field constitutionally reserved to Congress. Thus in the case of *Muskogee National Telegraph Company v. Hall*,[504] the court held that a purported exclusive tribal license to a telephone company could not bar Congress from issuing a similar license to another company. The validity of the tribal license was not questioned, but the claim to exclusiveness "was invalid from the time the grant was made, being an attempt on the part of the nation to exercise a power vitally affecting interstate commerce. which did not belong to it." (P. 385, per Thayer, *J.*)

Under the foregoing analysis the power of a tribe "to declare who shall come within the boundaries of its occupancy and under what regulations and conditions" exists in the absence of treaty or statute as an inherent power of the tribe. We have already noted that such power is not limited by statutes restricting the power to lease.[505] The power to issue permits, white neither

[502] Choctaw and Chickasaw Permit Laws, 18 Op. A. G. 34 (1884).

[503] Intruders on Lands of the Chocktaws and Chickasaws, 17 Op. A. G. 234 (1881).

[504] 118 Fed. 382 (C. C. A. 8. 1902). rev'g 4 Ind. T. 18 (1901).

[505] See sec. 19, *supra*.

created nor limited by statute, has been occasionally recognized and confirmed by statute."

There are administrative decisions upholding the validity of tribal permits approved by a superintendent, instead of by the Secretary of the Interior, who is required 'to approve tribal leases, [507] and upholding the validity of a tribal permit issued to a state conservation department for the establishment of a ranger station.[508] Tribal charters of incorporation issued by the Secretary of the Interior pursuant to section 17 of the Act of June 18, 1934,[509] sometimes distinguish between leases and permits, requiring departmental approval of leases but not requiring such approval of permits.[510]

For purposes of administering the payment of soil conservation benefits, the Department of Agriculture has ruled that in the case of grazing leases the lessee may receive conservation benefit payments but that in the case of permits neither the tribe nor the permittee may 'receive such benefits.[511]

The distinction between a lease and a permit or license received administrative consideration in connection with the validity of assignments made by a Pueblo to members of the Pueblo. The basic legal issues raised thereby must apply equally to transactions between the tribe and third parties : [512]

> This distinction has been considered by the courts in a great variety of cases. which seek to distinguish an interest in land from a mere license. A recent decision in the Circuit Court of Appeals for the Eighth Circuit holds :
>
> > "A mere permission to use land. dominion over it remaining in the owner and no interest or exclusive possession of it being given, is but a license. (Citing authorities)" *Tips* v. United *States*, 70 F. (2d) 525, 526.)
>
> The essential characteristic of a license to use real property, as distinguished from an interest in real property. is that in the former case the licensee has no vested right as against the licensor or third parties. He has only a privilege. which the licensor may terminate.
>
> As Justice Holmes pointed out. in *Marrone* v. *Washington Jockey Club*, 227 U. S. 633. "A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. . . . But if it did not create such an interest, that Is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach." (At page 636.)
>
> Put in its simplest terms, the rule is that a landowner does not transfer au *interest* in his land by allowing another to *use* the land. Thus, for instance, a member of the landowner's family, inasmuch as he is "a bare licensee of the owner, who has no legal interest In the land." cannot derive from his legal privilege. to *use* the land a right against the landowner or against third parties. *Elliott* v. *Town* of *Mason*, 81 Atl. 701 (N. H. 1911). See also *Keystone Lumber* Co. v. *Kolman*, 69 N. W. 165 (Wis. 1896). (Pp. 17–18.)

While it is easy to formulate a theoretical distinction between a lease and a license, there is actually a large "twilight zone" in which reasonable differences of interpretation may arise. Within this zone the courts have professed to look Into the intention of the parties to determine whether the transaction was intended to create a right against the landowner and against third parties; In which case it must be considered a lease, or was intended merely to confer a privilege, in which case a mere license relationship is established:

> Even the language of leasing will not suffice to create a lease relationship if the transaction leaves complete power over the land in the hands of the landowner. Thus, in the Case of *Tips* v. *United States*, 70 F. (2d) 525, the court found that an instrument which used. the. term "landlord," "tenant," "lease," etc., was nevertheless a mere license, because the so-called lessor. the War Department, had no power to lease the property or to grant more than a revocable permit to use the property. (P. 19.)[513]

Where the parties intend to create a bare license to use and enjoy tribal property, there is no statute under which the licensee may be barred from the use of such property nor can administrative authorities prevent the tribe concerned from peaceably tolerating such use. Whether, however. such permittee would be entitled to any protection against the tribe in the event of a breach of the conditions of the permit by the tribe is a question on which; unfortunately, no decisions are available.[514]

The terms and conditions of tribal permits have generally been agreed upon by the parties immediately concerned and the practical absence of litigation in this field leaves us without an authoritative basis for answering many questions which might be put. It has been administratively determined that a tribe may grant to an Indian service official a power of attorney to execute grazing permits covering tribal land. but that the Interior Department has no right to coerce the grant of such powers of attorney.[515]

The terms and conditions of tribal permits are prescribed in various of the constitutions and charters issued pursuant to sections 16 and 17 of the Act of June 18. 1934.[516] it has been administratively determined that a grant of a nonexclusive right-of-way across tribal land is not such a transfer of restricted Indian land as is absolutely prohibited by section 4 of the act cited, but that such a grunt is a conveyance of an *interest* in land and therefore, even though the Secretary of the Interior is authorized by statute to grant rights-of-way across tribal land for specified purposes. such a grant by the Secretary is Invalid, in the case of a tribe organized under section 16 of the act, unless the tribe consents thereto.[517]

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[506] See. for instance. Act of January 5. 1927, 44 Stat 932. safeguarding as an exclusive right of the Seneca Indians on their reservations in New York the right "to issue permits and licenses. for the leasing of game and fish."

[507] Memo. Sol. I. D., December 11, 1937.

[508] Memo. Sol I D., December 22. 1938.

[509] 48 Stat. 984. 986.

[510] Memo. Sol. I. D., November 11. 1937. Charter of Lac du Flambeau Tribe. sec. 5(b) and 5(b3). and *cf.* Memo. Sol. I. D. May 25. 1937 (preference to tribal members in issuance of grazing permits)

[511] The permit (Form 5–512) prescribed by the Secretary of the Interior by which grazing privileges upon tribal lands may be granted expressly states that "this instrument is not a lease and is not to he taken or construed as granting any leasehold interest in or to the land described herein. but that it is a mere permit, terminable and revocable in the discretion of the approving officer." The permittee. therefore. in our opinion. has no such legal estate or interest in the land so as In give him control thereof. Furthermore. the operator having only a personal privilege to graze livestock on the land is neither an owner. cash tenant. share tenant, nor a person who acts in similar Capacity: he is not within the definition of "ranch operator."

Whether the fee is or is not held by the United States Government in trust for the Indians. the land after it has been leased Is outside the control of the Government or the Department of the Interior. except to prevent waste or other injury to the freehold. including the right to limit the numbers of livestock and on such lands by the lessee to the grazing capacity thereof., the lease conveying an estate or interest in the land for the period of the lease. The lessee. renting for cash. Is a ranch operator by definition, and he has such estate or interest in the land upon which he operates as to give him control thereof Memo. Sol. Dept. Agriculture, February 17. 1937.

[512] Op. Sol. I. D.. M.29566. August 9, 1939.

[513] Ibid.

[514] The nearest case in point seems to he *Sharrock* v *Kreiger*, 6 Ind T 466 (1906). but this situation was governed by sec 3 of the Curtis Act of June 28. 1898, 30 Stat. 495. applicable only to the Five Tribes. which granted permittees the privilege of remaining on tribal land rent-free long enough to cover the value of their improvements.

[515] Memo. Sol. I. D.. November 11, 1935.

[516] 48 Stat. 984. 988-987. 25 U. S. C. 476. 477.

[517] Memo. Sol. I. D., September 2. 1936.