UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

HANDBOOK of FEDERAL INDIAN LAW

WITH REFERENCE TABLES AND INDEX

By

FELIX S. COHEN
Chairman, Board of Appeals
Department of the Interior

Foreword by

HAROLD L. ICKES
Secretary of the Interior

Introduction by

NATHAN R. MARGOLD
Solicitor for the Department
of the Interior

First Printing 1941
Second Printing 1942
Third Printing 1942
Fourth Printing 1945

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON : 1945

For sale by the Superintendent of Documents, Washington, D. C. - Price $2.50

CONTENTS

FOREWORD

There are few subjects in the history and law of the United States on which public views are more dramatically and flagrantly erroneous than on the subject of Indian affairs. According to the popular view, the Indian is a vanishing race; his lands are steadily dwindling; restricted as to the hunt and denied the warpath; he has nothing to live for and nothing to contribute to our civilization; he is not entitled to the rights of citizenship; he subsists on "rations"; and he cannot sign his name without the, approval of a reservation superintendent.

The facts are very different. Indians today are probably the most rapidly increasing racial group in our population; the total area of Indian lands has been increasing slowly but steadily for nearly 5 years; the Indian today is making significant and vital contributions to American art and craftsmanship, and to our knowledge and enjoyment of the resources of forests, plains, streams, and trails that were here long before white immigrants came; all native Indians today are citizens, entitled to all of the rights and bound by all of the obligations of citizenship; if-some of them still have equitable interests in property which they cannot alienate, they share this disability, or advantage, with a large number of their non-indian fellow citizens.

That Indians have legal rights is a matter of little practical consequence unless the Indians themselves and those who deal with them are aware of those rights. Such, however, is the complexity of the body of, Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and administrative' rulings, rendered during a century and a half, that one can well understand the vast ignorance of the subject that prevails even in ordinarily well informed quarters. For more than a century, commissioners of Indian affairs have appealed for aid in reducing this unmanageable mass of materials to some orderly form. Yet during that period none of the attempts to compile a simple manual of the subject was carried to completion.

Ignorance of one's legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression.

It is entirely fitting that this contribution to the enlightenment of administrators and Indians should have been made under the leadership of one who has striven valiantly to free our national relations-with the Indian tribes from the despotic traces of less tolerant epochs. On April 28, 1934, President Franklin D. Roosevelt, in urging the passage of the Wheeler-Howard Act, which, with its recent extensions to Oklahoma and Alaska, stands today as the most important segment of our Indian law, declared:

> The Wheeler-Howard bill embodies the basic and broad principles of the administrat,ion for a new standard of dealing between the Federal Government and its Indian wards.
>
> It is, in the main, a measure of justice that is long overdue.
>
> We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection.
>
> Certainly the continuance 'of autocratic rule, by a Federal department, over the lives of more than 200,000 citizens of this Nation is incompatible with American ideals of liberty. It also is destructive of the character and self-respect of a great race.
>
> The continued application of the allotment laws, under which Indian wards have lost more than two-thirds of their reservation lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated.
>
> Indians throughout tbe country, have been stirred to a new hope. They say they stand at the end of the old trail. Certainly, the figures of impoverishment and disease point to their impending extinction, as a race, unless basic changes in their conditions of life are effected.
>
> I do not think such changes can be devised and carried out without the active cooperation of the Indians themselves.
>
> The Wheeler-Howard bill offers the basis for such cooperation. It allows the Indian people to take an active and responsible part in the solution of their own problems.

This handbook of Federal Indian Law will constitute, I believe, a lasting contribution towards the ideals thus enunciated.

This work cannot have the legal force of an act of Congress or the decision of a court. Whatever legal force it will have must be derived from the original authorities which have been assiduously gathered and patiently analyzed. In publishing this work the Department of the Interior does not assume responsibility for every generalization, prediction, or inference that may be found in the volume. What is implicit, however, in the fact of publication is a considered judgment that this volume will prove a valuable aid in fulfilling the obligation which Congress hasl laid upon the Department of the Interior to protect and safeguard the rights of our oldest national minority.

The labors which Solicitor Nathan R. Margold, Assistant Solicitor Felix S. Cohen, and their aides and collaborators have devoted to this .pioneer work will be appreciated, not only by those Indians and Indian Service administrators whose needs it most directly serves, but by all of us who hold dear the civilized ideals of liberty and tolerance.

(Signed) HAROLD L. ICKES.

JULY 9, 1940.

INTRODUCTION

1. THE BACKGROUND OF FEDERAL INDIAN LAW

We in this country are slowly learning to appreciate the significance of the problem of Indian rights for the cause of democracy here in the United States and throughout the Western Hemisphere. Over the radio, a few months ago, came the words of a man who knows more than any one else in the world about Indians as human beings. His words are a better introduction to the Indian problem than I can write.

> What sort of treatment dominant groups give to subject groups--how governments treat minorities--and how big countries treat little countries. This. is a subject that comes down the centuries, and never was it a more burning subject than in this year 1939 even in this month December 1939.
>
> So the question 'How has our own country treated its oldest and most persisting minority, the Indians; how has it treated them and how is it treating them now? This is an, important question. I believe that nearly all Americans realize the importance of this question. Many millions of our citizens feel an interest. curious and sympatbetic and sometimes enthusiastic, in our Indian minority,
>
> What I shall describe will be a bad beginning which lasted long' time, which broke Indian hearts for generation after generation: which inflicted destructions that no future time can wholly repair. Then I shall.describe how the long-lasting bad record was changed to something 'good; how, although the change came so late, it did not come too 1ate; how when the change came; it still found hundreds of Indian tribes ready to respond to the opportunity which at last had been given them. I. shall describe how the good change has developed across three Presidencies, so that it is not an achievement or program of a single political party. But I shall describe, too, the decisive and immense good change which has come under President Franklin D. Roosevelt and Secretary of the Interior, Harold L. Ickes.

I shall not quote the main body of Commissioner Collier's speech, for that reappears, amplified and developed somewhat, in the pages that follow. I quote, again, only his finaI words:

> No, the task is not, finished. It is only well begun. But one part of the task is finished; and it marks and makes an epoch. The repressions which crushed the Indian-spirit have been lifted away. From out of an ancient- and dark prison house the living Indian has burst into. the light, into the living sunlight and the future. All of his age-tempered powers and his age-tried discipline are still there. He knows that the future is his; and that the century of dishonor, for him, is ended.
>
> But 'he needs our continuing help; and our nation's debt to him is not yet paid.
>
> The thing we have started to do, and with your help, you citizens of our country, will continue to do; is to aid the Indian work out his own destiny. We have helped him to retain and to rebuild the richness of his own national life, and in doing this we think we have enriched the national life, the national heritage and the national honor of 130,000,000 Americans. This is the way the democracy of the United States is solving the minority problem of its first Americans.
>
> Let me carry your thought beyond our own national borders. Our Indians are a tiny, though now a growing minority. But south of the Rio Grande, the Indians number not hundreds of thousands, but millions. Pure-blooded Indians are the major population in Mexico, in Guatemala, Honduras, Peru, Ecuador. There are thirty million Indians-one growing race, and one of the world's great races. And that race is marching toward power. It may be that the most dependable guarantee of the survival and triumph of real democracy in our hemisphere, south of the Rio Grande, is this advance toward power of the Indians, who from must ancient times, and now, are believers in, and practicers of local democracy.
>
> What WC are doing-what with your help we shall do-to meet our own Indian minority problem has a deep significance to these 30,000,000 other Indians, and to all the countries where they arc located. Here we enter within the battleground and effort-ground of our Western Hemisphere destiny. It is upon this scale of two continents, and of a democracy defended and increased through at least one-half of our globe. that world-history will view our own record with our Indian minority.

[1] "America's Handling of Its Indigenous Indian Minority," an address by John Collier, December 4, 1939, 7 Indians at Work, No. 5. January, 1949. PP. 11, 16.

Against this background of history and of struggle and hope, the federal law governing Indian affairs may be viewed not, as it has too often been viewed, as a curious collection of anachronisms and mysteries, but rather as a revealing record in the development of our American constitutional democracy. The decline of dictatorship in the Indian country is fresh enough in our national memory so that WC may perhaps profit from an analysis of weaknesses that dictatorial bluster ever seeks to conceal, and from an understanding of the ways in which the forms and forces of democracy have, in this small sector of an endless battle line, won victory.

2.THE BASIS OF FEDERAL INDIAN LAW

For more than a century, Supreme' Court Justices, Attorneys General, and Commissioners of Indian Affairs have commented on the intricate complexity and peculiarity of federal Indian law. Yet until now no writer has attempted to gather into a single work these intricacies. The reason may perhaps best be appreciated by those who have attempted that task. The federal law governing Indians is a mass of statutes, treaties, and judicial and administrative rulings, that includes practically all the fields of law known to textbook writers--the law of real property, contracts, corporations, torts, domestic relations, procedure, criminal law, federal jurisdiction, constitutional law, conflict of laws, and international law. And in each -of these fields the fact that Indians are involved gives the basic doctrines and concepts of the field a new quirk which sometimes carries unpredictable consequences.

To survey a field which includes, for instance, more than four thousand distinct statutory enactments, one must generalize. And generalization on the subject of Indian law is peculiarly dangerous.

For about a century the United States dealt separately with the various Indian tribes and the legal rights of the members of each tribe were fixed by treaty.[2] These treaties are for the most part still in force and of recognized validity. In them one finds reflected the very wide pre-Columbian divergencies that existed, for instance, between the great agricultural towns and confederacies of the Southeast and the loosely organized nomadic hunters of the Plains area, or between the small fish-eating, slave-owning bands of the Northwest Coast and the great constitutional democracy that was the League of the Iroquois.

When Congress in 1871 enacted a law [3] prohibiting further treaty making with the Indian tribes, the form of governmental dealing with the Indians was changed, but the essential character of those dealings was not modified. Congress continued to deal with-the Indian tribes, in large measure, through "agreements," ratified by both Houses of Congress, which do not differ from treaties in legal effect. The only substantial change accomplished by the law of 1871 was that whereas Indian treaties were submitted for the ratification of the Senate alone, as the Constitution of the United States provides, agreements are ratified by the action of both Houses, and thus the House of Representatives, which had long been excluded from equal participation in Indian affairs,. has achieved an equal status with the Senate in that field. Apart from treaties and agreements with particular tribes, the dealings of the Federal Government with the Indians have been predominantly by way of special statutes applying to named tribes, and, most recently, by way of tribal constitutions and tribal charters, all varying very considerably among the different tribes. Until the last years of the nineteenth century there was very little general legislation applying a uniform pattern to all tribes, and what little there was usually turns out, on analysis, to be in the nature of generalization from provisions that had appeared in several treaties.

During what may be roughly defined as the allotment period-from 1887, when the General Allotment law [5] was passed, to 1933, when the process of allotment came to an end-there developed a tendency to impose upon all Indian tribes a uniform pattern of general laws and general regulations. This tendency was commonly justified in terms of administrative efficiency and economy, and to this justification there was sometimes added the thought that Indian treaties; special statutes, and regional differences were all outworn relics which had to be sacrificed in the march of national progress. The effect, however, of this policy of ignoring the special rights conferred on individual tribes by treaty and statute and ignoring the political autonomy and cultural diversity of the tribes was to cause tremendous and widespread resentment among the Indians. The Indians found Indian and white champions. Protest against mistreatment of the Indian led to many investigations. A survey was conducted by the Institute for Government Research at the request of Secretary of Interior Work. The results of this study, published in 1928 under the title: "The Problem of Indian Administration," gave direction

[2] See Chapter 3. for an analysts of these treaties.
[3] Act of March 3. 1871. 16 Stat. 544. 566, R. S. § 2079, 25 U. S. C. 71.
[4] Article II. sec. 2.
[5] Act of February 8, 1887, 24 Stat. 388. 25 U. S. C. 331 *et seq.*

for more than a decade to Indian reform. On February 1, 1928, the Senate authorized its Committee on Indian Affairs to carry out an intensive survey of the condition of the Indians in the United States[6]

.These investigations have brought to light many of the evils resulting from attempts to impose a uniform patternp of treatment upon groups with different wants, and thus have strengthened the tendency towards special consideration of the legal problems of particular tribes. The policy of superseding the old pattern of uniformity and absolutism found expression in the Wheeler-Howard (Indian Reorganization) Act. Pursuant to this, law, approved on June 18, 1934,[7] more than a hundred tribes in the United States adopted their own constitutions for self-government! Practically all the regulations of the Indian .Service have now been made subject to modifications for particular tribes through the provisions of these tribal constitutions and tribal ordinances.

These considerations indicate that a work on federal Indian law must deal with law made for, and in large part by, diverse groups with divergent economic interests, political institutions, and levels of cultural attainment.

Anyone -who has worked in the field of Indian litigation is frequently asked by otherwise well 'informed people whether he understands ."the Indian language." There are, in fact, more, than 200, different Indian languages, some of them as distinct from each other as English and Chinese. This linguistic diversity is paralleled by diversities in the conditions and legal problems of more than' 200 different Indian reservations.

Common opinion pictures the original American dressed in feathers and wampum, his belt adorned with scalps, mounted on a horse, gazing after buffalo. This picture blurs over the fact that many Indians, before white contact, were farmers and fishermen who had never seen feather head-dresses, wampum, scalps, or buffalo, that no Indian ever rode a horse before the Spaniards brought horses into North America, and that the specia1 combination' of striking Indian peculiarities which the modern "circus Indian" embodies did' not exist before the rise of modern American showmanship.

Just as the popular picture of the Indian embodies a false juxtaposition of traits, so the popular view of Indian law embodies a false juxtaposition of ideas.

The popular view of the Indian's legal status proceeds from the assumption that the Indian is a ward of the Government, and not a citizen, that therefore he cannot make contracts 'without Indian Bureau approval, that he holds land in common under "Indian title," that he is entitled to education in federal schools when he is young, to rations when he is hungry, and to the rights of American citizenship when he abandons his tribal relations.

This is, on the whole, a thoroughly false picture, although historical exemplification may be found for each feature.

It would be absurd to set up in place of this false-and oversimplified picture of federal Indian law any other equally simple picture. It may be worth while, however, to set forth certain hypotheses concerning the recurrent patterns of federal Indian law, which will be tested against decisions, statutes, and treaties in the pages that follow.. These hypotheses may be conveniently grouped under four leading principles: (1) The principle of the political equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians.

---

[6] Whereas there are two hundred and twenty-five thousand Indians presently under the control of the Bureau of Indian Affairs, who are, in contemplation of law. citizens of the United States but who are in fact treated as wards of the Government and arc prevented from the enjoyment of the free and independent use of property and of liberty of contract with respect thereto; and

Whereas the Bureau of Indian Affairs handles. leases, and sells Indian property of great value, and disposes of funds which amount to many millions of dollars annually without responsibility to doll courts and without effective responsibility to Congress: and

Whereas It is claimed that the control by the Bureau of Indian Affairs of the persons and property of Indians is preventing them from accommodating themselves to the conditions and requirements of modern life and from exercising that liberty with respect to their own affairs without which they can not develop into self-reliant, free, and independent citizens and have the rights which belong generally to citizens of the United States; and

Whereas numerous complaints have been made by responsible persons and organizations charging improper and Improvident administration of Indian property by tbe Bureau of Indian Affairs; and

Whereas It is claimed that-preventable diseases are widespread among the Iudlan population, that the death rate among them is not only unreasonably high but is increasing, and that the Indians in many localities arc becoming pauperized; and

Whereas the acts of Congress passed In the last hundred years having as their objective the civilization of the Indian tribes seem to have failed to accomplish tbe results anticipated; and

Whereas it is expedient that sald ads of Congress aud the Indian policy incorporated In said acts be examined and the administration and operation of the same as affecting the condition of the Indian population he surveyed and appraised: Now, therefore, be it

Resolved, That the Committee on Indian Affairs of the Senate is authorized and directed to make a general survey of the conditions of the Indians and of the operation and effect of the laws which Congress has passed for the civilization and protection of the Indian tribes; to Investigate the relation of the Bureau of Indian Affairs to the persons and property of Indians and the effect of the acts, regulations, and administration of said bureau upon the health, improvement. and welfare of the Indians; and to report its findings in the premises. together with recommendations for the correction of abuses that may be found to exist, and for such changes in the law as will promote tbe security, economic competence. and progress of the Indians.

Said committee is authorized to send for persons, hooks. aud papers. to administer oaths, to employ such clerical assistance as is necessary, to sit during MY recess of the Senate, and at such places as it may deem advisable. Any subcommittee, duly authorized thereto. shall have the powers conferred upon the committee by this resolution.

The expenses of sald investigation shall be paid out by the contingent fund of the Senate aud shall not exceed $30,000. (S. Res. 79, 79th Cong., 1st sess.)

[7] 48 Stat. 984, 25 U. S. C. 461 *et seq.* For subsequent amendments and extensions, see Chapter 7.

[6] See Chapter 7.

A. POLITICAL EQUALITY

The right to be immune from racial discrimination by governmental agencies is an essential part of the fabric of democratic government in the United States. In part, this right is constitutionally affirmed by the fifth fourteenth, and fifteenth amendments to the Federal Constitution; in part, the right is embodied in statutes providing penalties for racial discrimination by agencies of Federal and State Government; and, in part, the right is no more than a moral right implicit in the character of democratic government but not always protected by adequate legal machinery.

Despite a widely prevalent impression to the contrary, all Indians born in the United States are citizens of the United States and of the state in which they reside? As citizens they are entitled to the rights of suffrage guaianteed by the fifteenth amendment,[10] and they are likewise entitled to hold public office,** to sue,[12] to make contract.&[18] and to enjoy all the civil liberties guaranteed to their fellow citizens." These rights take on a special significance against the background of highly organized administrative control. They indicate that a body of federal Indian law, considered as "racial law," would be as much an anomaly as a body of federal law for persons of Teutonic descent, and that the existence of federal Indian law can be neither justified nor understood except in terms of the existence of Indian *tribes.*

B. TRIBAL SELF-GOVERNMENT

The principle that an Indian tribe is a political body with powers of self-government was first clearly enunciated by Chief Justice Marshall in the case of *Worcester v. Georgia* [b] Indian tribes or nations, be declared,

> had always been considered as distinct, independent, political communities, retaining their original natural rights, (P. 559.)

To this situation was applied the accepted rule of international law:

> * * * the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self-government by associating with a stronger, and taking its protection. (P. 560.)

From these premises the courts have concluded that Indian tribes. have all the powers of self-government of any sovereignty except insofar as those powers have been modified or repealed by act of Congress or treaty. Hence over large fields of criminal and civil law, and particularly over questions of tribal membership, inheritance, tribal taxation, tribal property, domestic relations, and the form of tribal government, the laws, customs, and decisions of the proper tribal governing authorities have, to this day, the force of law.[16]

C. FEDERAL SOVEREIGNTY

The doctrine that Indian affairs are subject to the control of the Federal Government, rather than that of the states, derives from two legal sources.[17] In the first place, the Federal Constitution expressly conferred upon the-congress of the United States the power "to regulate commerce with the Indian tribes." [18] Matters internal to the tribe itself even to this day have been left largely in the hands of tribal governments. Federal power has generally been invoked in matters arising out of commerce with the Indian tribes, in the broad sense in which, that phrase has been used to include all transactions by which Indians sought to dispose of land or other property in exchange for money, liquor, munitions or other products of the white man's civilization. The growth of the commerce clause has meant the expansion of federal power in Indian affairs, at the expense of state power.

Supplementary to the express constitutional power over commerce with the Indian tribes which was conferred upon Congress, the Federal Government was constitutionally endowed with plenary power over the making of treaties. Since the Federal Government had made several treaties with Indian tribes prior to the adoption of the Constitution in 1787, and continued to make such treaties for more than eight decades thereafter, the growth of federal power over Indian relations, at the expense of all claims of state power, was continuous and unchecked during the period in which the outlines of our present law of Indian affairs were established.

---

[9] See Chapter 8. sec. 2.
[10] See Chapter 8. sec. 2.
[11] See Chapter 8, sec. 4.
[12] See Chapter 8, sec. 6.
[13] See Chapter 8. sec. 7.
[14] See Chapter 8. sec. 10
[15] 8 Pet. 515 (1832).
[16] See Chapter 7.
[17] See Chapter 5.
[18] Art. I. sec. 8.

At the present time it may be laid down as a rough genera. rule that Indians on an Indian reservation are not subject to state law. This exemption is of particular importance in the fields of criminal law and taxation. The general rule has beenmodified in a few particulars by congressional action conferring upon the state specific power over certain subjects. Perhaps the most important of these laws delegating power to the states is the General Allotment Act, [O] which provides that, when tribal lands have been individualized, the individual parcels shall be inherited in accordance with the laws of the state. Another important exception to the general rule of federal sovereignty exists in the case of Oklahoma, where very extensive powers over Indians have been conferred upon the government of the state." In both of these cases, as well as in various other matters, the power of the state is defined by federal legislation.[2,]

. D. GOVERNMENTAL PROTECTION OF INDIANS

Most of the legislation of the United States with respect to Indian affairs is subject to a dual interpretation. To the cynic such legislation may frequently appear as a mechanism for the orderly plundering of the Indian. To those more charitably inclined, the Government has appeared as the protector of the Indians against individuals who wished to separate the Indian from hi possessions. Without attempting to anticipate the judgment that history will render on this conflict of doctrine, it may be said that at least the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations. with non-Indians. As was said by the Supreme Court of the United States in the case of United *States* v. *Kagama:*[n]

> Because of the local ill feeling, the people of the States where they [the Indian tribes] are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. (P. 384.)

As a practical matter theindividuals against whom the Indian needed the most vigorous. kind of protection were the trader and the settler. Both wanted Indian land. The trader also wanted furs. The trader offered directly or indirectly, in exchange for land or furs, kettles, knives, clothing, liquor, firearms, ammunition, and other commodities. Some of these commodities were unknown in the pre-Columbian cultures, and the tribes had developed no adequate social controls over their use; the byproducts of this trade were disease, violence and, in many cases, the destruction of the game on which the Indians had subsisted. The settler wanted Indian land.' Often he offered, in exchange for the land, the trader's goods; often he took the land without offering any quid pro quo. This intercourse between Indians and whites threatened the decimation of Indians through violence, disease, and starvation and imposed upon the Federal Government a tremendous cost for military protection of the white frontier families against the not always discriminating retaliation of the despoiled natives. The effort to control this intercourse was the guiding motif of federal Indian legislation down to our own generation.

Thus the problems of federal Indian law have been primarily the problems of (1) the regulation of Indian traders,. (2) controlling the disposition of Indian land, (3) the protection of that land against trespass, and (4) the control of the liquor traffic. A few words on each of these four points may suggest the general contours of our federal law on 1ndian affairs.

(1) In 1790 the Federal Congress adopted the policy of regulating trade with the Indians through a system of licensing traders.[23] Except for a brief period, from 1796 to 1822, when a system of Government trading houses was maintained, the principle of control of Indian trade through licenses has been in force. Under this system federal supervision of the character and quality of goods sold and prices charged has been possible. Sales of liquor, and of firearms and ammunition not needed for useful purposes, have-been banned: The system depended very largely for its effectiveness upon the isolation of the Indian groups affected, and in recent years the growth of towns and cities upon or near various Indian reservations and the development of mail-order trade have introduced elements of uncertainty into the question of the present efficacy and future development of our federal control over Indian trade.

---

[19] Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. 331 *et* seq. See Chapter II.

[20] See Chapter 23.

[21] See Chapter 6.

[22] 118 U. S. 375. 334 (1886). The comma after "them" in the third line of the quotation appears In the Supreme Court Reporter edition but not In the U. S. Reports edition. It is essential to the sense of the passage. The Supreme Court itself corrected this error the first time It had occasion to quote this passage (*Choctaw Nation* v. *United States*, 119 U. S. 1, 27 (1886)), but in recent years the error has generally gone unnoticed and the direct dependence of federal power over Indians upon treaties has often been overlooked.

[23] See Chapter 16.

(2) The problem of federal control over the disposition of Indian lands becomes a very esoteric legal problem if pursued into the mysteries which have been created by those who sought to deduce specific limitations upon Indian land sales from the inherent attributes of the general concept of "Indian title." The notion of "Indian title," as a supposed special form of tenure involving rights of possession but no right of alienation; is a notion that depends upon certain feudal doctrines of sovereignty, dominion, and seizin, on which endless controversy is possible. The subject, however, loses much of its mystery if the sale of land be viewed against the background of federal control over other types of Indian trade. The fact is that, while recognizing that the Indian tribes owned lands in their possession and had the right to dispose of them the Federal Government has always circumscribed such disposition by means of laws prescribing the manner and terms upon which Indian land may be alienated.[24] The economic significance of this control is apparent in the following statement of the United States Supreme Court?

> The Indian right to the lands as property, was not merely of possession; that of alienation was concomitant: both were equally secured, protected and guarantied by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing the king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property-in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations,-was necessary to vest a title. (Pp. 758-759.)

The first Indian Intercourse Act [26] provided that all alienations of Indian land should be made "at some public treaty, held under the authority of the United States." In the land sales that were made by treaty the United States was generally the purchaser, but in a few cases States or private individuals were designated as purchasers of the land sold.

Apart from treaties, a series of special statutes, generally but not always dependent upon the consent of the Indians concerned, provided for the sale of Indian lands. Other statutes, general as well as special, have provided for the leasing, by the Indians or by the Secretary of the Interior on their behalf, of Indian lands and minerals and the sale of Indian-owned timber.[27] Legislation authorizing the allotment of tribal lands, and supplementary laws dealing with such allotments, have provided for the sale or lease of allotted lands, under various degrees of federal administrative supervision.[28]

By maintaining its control over tho transactions by which Indians dispose of land, the United States has been able to establish a degree of control over the moneys or other *quid pro* quo received by the Indians in connection. with such disposition.[29] Thus various types of tribal and individual funds, generally representing returns from the disposition of Indian land and subject to federal control, have been established, and a good deal of the attention which Congress and the Interior Department have given to the Indian problem has been directed to the proper use of this money. Part of this vast fund, obtained from the disposition of Indian natural resources, has been used for the administration of education, health, and other public services on the Indian reservations; part of it has been distributed to the Indians in per capita payments, and part has been utilized, with or without the consent of the Indians, for expenses 'of government administration on the reservations. The various service functions of the Indian Service which have developed out of the administration. of these funds must be left for later treatment [30] It is enough for our present purposes to note that the principle of federal protection of the Indian, applied specifically to Indian lands, continued to exert its force beyond the transaction of Indian land sale, and that by virtue of this principle federal control came to be extended over almost the entire economic life of the Indian.

(3) The protection of Indian land against trespass was one of the first responsibilities assumed by.the Federal Government. The promise of such protection for lands retained by the Indian tribes was an important *quid pro quo* in the process of treaty-making by which the United States acquired a vast public domain.[31] This

[24] See Chapter IS.
[25] *Mitchel* v. *United States*, 9 Pet. 711, 758-759 (1835). And see Chapter 15. sec 18.
[26] Act of July 22. 1790, 1 Stat. 137.
[27] See Chapter 15.
[28] See Chapters 9. 11.
[29] See Cbnpter 10.
[30] See Chapter 12
[31] See Chapter 3.

promise of protection was sometimes backed up by a treaty provision declaring that trespassers put themselves outside the protection of the Federal Government, and might be dealt with by the tribes themselves according to their own laws and customs.

It is characteristic of the piecemeal approach characterizing federal legislation on Indian affairs that despite the importance of the. subject of trespass upon Indian lands no general legislation on the subject has ever been enacted. Apart from the various treaty provisions with particular bribes, there are separate laws dealing with trespass by unlicensed traders, by horse thieves, and other' criminals or would-be criminals, by settlers, by persons driving livestock to graze on Indian lands, and by hunters and trappers.[32] Rut there is to this day no general law. which can be invoked against those trespassers whose occupation Congress has not foreseen. Ordinary civil actions have been brought by, or on behalf of, Indians and Indian tribes to protect Indian lands against-trespass, but Indian unfamiliarity with legal procedure has often rendered this remedy ineffective. In recent years the Federal Government has devoted considerable attention to litigation for the protection of Indian lands against trespass. The right of the Federal Government to bring such suits has been justified either on the theory that title to the lands rested with the Federal Government or on the more general theory that the Federal Government has a special obligation, as guardian of the Indians, to protect their lands against trespass even where full title in fee simple is held by the Indian tribe.[33] It is pertinent to note, finally, that the federal protection of Indian lands against trespass by State authorities has given rise to the established doctrine that such lands are not subject to State land taxes.[34] This doctrine has been invoked, in turn, by state authorities as a reason for not rendering to reservation Indians various public services that are rendered to other citizens of the state, e. g. public education.[35]

(4) In the belief that a great deal of Indian disorder was the result of traffic in intoxicants, Congress early established a total prohibition law for the Indian country.[36] This law has been maintained in force continuously for more than a century. The breaking down of early conditions of isolation has made the enforcement of this legislation an increasingly difficult problem.

E. SUMMARY

In each of the foregoing four fields of legislation' the principle of federal protection of the Indians has been carried into effect by means of some type of federal control over transactions between Indians and non-Indians, whether through complete prohibition, licensing, or the prescribing of conditions governing particular transactions. It is fair to say that historically and logically federal control over transactions of these four types is at the root of the entire body of federal legislation on Indian affairs. Thus this tremendous and unwieldy mass of legislation, comprising more than 4,300 distinct enactments, may be viewed in its entirety as the concrete content. of the abstract principle of federal protection of the Indian.

In terms, this principle, an offspring of the more general one of federal sovereignty over Indian affairs, is entirely consistent with the principles of racial equality and of tribal self-government in matters internal to the tribe. In practice; however, the unsolved problems of our federal law in the field of Indian affairs all deal fundamentally with the demarcation of domain among these independent competing principles.

3. METHOD OF TREATMENT

This handbook does not purport to be a cyclopedia. It does not attempt to say the last word on tho varied legal problems which it treats. If one who seeks to track down a point of federal Indian law finds in this volume relevant background, general perspective, and useful leads to the authorities, the handbook will have served the purpose for which it was written. More than this might have been done if it had been possible to carry through the work on the scale in which it was originally planned by Assistant Attorney General McFarland.

The method of this handbook is dictated by its subject matter. Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored. As I have elsewhere observed,[37] the groups of human beings with whom Federal Indian law is immediately concerned have undergone, in the century and a half of our-national existence, changes in living habits, institutions, needs and aspirations far greater than the changes that separate from our own age the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated.

[32] See Act of July 22, 1790, 1 Stat. 137: Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139; Act of June 30. 1334.4 Stat. 729.

[33] See Chapter 15. sec. 10D.

[34] *The New York Indians*, 6 Wall. 761 (1866). Aod see Chapter 13.

[35] see Chapter 6.

[36] See Chapter 17.

[37] U.S. Department of the Interior. Office of the Solicitor, Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians, edited by Felix S. Cohen, Chief. Indian Law Survey. with a Foreword by Nathan R. Margold, Solicitor, Department of the interior (1940.46 vols.) vol. 1. PP. ii-iii.

Telescoped into a century and a half, one may find changes in social, political, and property relations which stretch over more than 30 centuries of European civilization. The toughness of law which keeps it from changing as rapidly as social conditions change in our national life is, of course, much more serious where the rate of social change is 20 times as rapid. Thus, if the laws governing Indian affairs are viewed as lawyers generally view existing law, without reference to the varying times in which particular provisions were enacted, the body of the law thus viewed is a mystifying collection of inconsistencies and anachronisms. To recognize the different dates at which various provisions were enacted is the first step towards order and sanity in this field.

Not only is it important to recognize the temporal "depth" of existing legislation, it is also important to appreciate the past existence of legislation which has, technically, ceased to exist. For there is a very real sense in which it can be said that no provision of law is ever completely wiped out. This is particularly true in the field of Indian law. At every session of the Supreme Court, there arise cases in which the validity of a present claim depends upon the question: "What was the law on such and such a point in some earlier period?" Laws long repealed have served to create legal rights which endure and which can be understood only by reference to the repealed legislation. Thus, in seeking a complete answer to various questions of Indian law, one finds that he cannot rest with a collection of laws "still in force," but must constantly recur to legislation that has been repealed, amended, or superseded.

Important, however, as is the historical factor in the understanding of federal Indian law, a mere chronology of laws and decisions would be of little value. Systematic analysis is needed, the more so because no treatise has ever been written on the subject of federal Indian law. Indeed the subject hardly exists, as yet, except as a mass of rules and laws relating to a single subject matter. Unfortunately relation to a single subject matter is not enough to establish systematic interconnections among the rules and statutes so related. This any lawyer can see for himself by referring to treatises on "the law of horses" or "the law of fire engines." Federal Indian law does exhibit a systematic interconnectedness of parts, but to discover and define the common standards, principles, concepts, and modes of analysis that run through this massive body of statutes and decisions is an analytical task of the first order.

History and analysis need to be supplemented by an understanding of the actual functioning of legal rules and concepts, the actual consequences of statutes and decisions. Language on statute books, in the field of Indian law as in other fields, frequently has only a tenuous relation to the law-in-action which courts and administrators and the process of government have derived from the words of Congress. The words of court opinions frequently have as tenuous a relation to the actual holdings. Magic "solving words" like "Indian title," "wardship," and "competency," are often used to establish connections, between a case under consideration and some precedent, that turn out on reflection to be purely verbal. Functional study of the federal Indian law. in action is essential to a work that may serve the practical purposes of administrators.

While it has been fashionable in some circles to consider historical, analytical, and functional approaches to legal problems as mutually exclusive and antagonistic, a more tolerant and useful viewpoint is expressed in the keynote article of one of the most promising of the newer legal periodicals:

> Precisely because it is a very different question from these questions that have occupied so large a part of traditional jurisprudence, the question of the human significance of law must be posed as a supplement to established lines of inquiry in legal science rather than as a substitute for them. Indeed, there is an intimate and mutual interdependence among these lines of inquiry, historical, analytical, ethical, and functional.
>
> The law of the present is a tenuous abstraction hovering between legal history and legal prophecy. The functionalist cannot describe the present significance of any rule of law without reference to historical elements. It is equally true that the historical jurist cannot reconstruct the past unless he grasps the meaning of the present.
>
> The functionalist must have recourse to the logical instruments that analytical jurisprudence furnishes. Analytical jurisprudence, in turn, may develop more fruitful modes of analysis with a better understanding of the law-in-action.
>
> Functional description of the workings of a legal rule will be indispensable to one who seeks to pass ethical judgments on law. The functionalist, however, is likely to be lost in an infinite maze of trivialities unless he is able to concentrate on the *important* consequences of a legal rule and ignore the *unimportant* consequences, a distinction which can be made only in terms of *an* ethical theory.

[1] F. S. Cohen. The Problems of a Functional Jurisprudence, 1 Modern Law Review (London) (1937) 5, 7.

When I assigned to the writer of these words the task of applying to the field of Indian law the standards of scholarship which he had written about and demonstrated in several other fields,[39] I did so with the conviction that the resulting work would be a contribution to legal scholarship and legal method as well as to the immediate field of Indian law. Assistant Solicitor Felix S. Cohen has brought to bear in the writing of this work not only an unusual equipment in fields of research but seven years of practical experience in handling on the various Indian reservations the most difficult controversies that have arisen during that period and in drafting a significant part of the legislation about which he writes.

(Signed) NATHAN R. MARGOLD,
Solicitor.

DEPARTMENT OF THE INTERIOR, *July 3, 1940.*

[39] The Ethical Basis of Legal Criticism (1931), 41 Yale Law Jour. 201; Ethical Systems and Legal Ideals (1933); (In collaboration with Mr. Justice Shientag) Summary Judgments in the Supreme Court of New York (1932). 32 Col. Law Rev. 825; The Subject Matter of Ethical Science (1932), 42 Int. Jour. of Ethics 397; Modern Ethics and the Law (1934), 4 Brooklyn Law Rev. 33; Transcendental Nonsense and the Functional Approach (1935), 35 Col. Law Rev. 809; Anthropology and the Problems of Indian Administration (1937), 18 Southwestern Social Science-Quarterly No. 2; The Relativity of Philosophical Systems and the Method of Systematic Relativism (1939), 36 Journal of Philosophy 57; The Social and Economic Consequences of Exclusionary Immigration Laws (1939), 2 Nat. Lawyers Guild Quart. 171; Indian Rights and the Federal Courts (1940). 24 Minn. Law Rev. 145.

AUTHOR'S ACKNOWLEDGMENTS

It is a pleasant duty to acknowledge the aid of the many individuals who have cooperated in the preparation of this work.

In the first place, it must be said 'that this work would not have been completed but for the strong belief of my two chiefs, Secretary Harold L. Ickes and Solicitor Nathan R. Margold, and of Commissioner of Indian Affairs John Collier in. the importance of the work and their inspiring confidence in the ability of our tiny staff to carry it to completion.

Secondly, I must acknowledge the aid and encouragement that were given in the early stages of the work by Carl A. McFarland, then Assistant Attorney General, and his able assistant, Charles E. Collett, then Chief of the Trial Section in the Lands Division of the Department of Justice. Theirs was the vision that those who have worked in the preparation of this Handbook have tried to carry out, and their cooperation in this work, so long as they were able to give it, was unstinted.

Of those who aided in the actual preparation of this Handbook I owe a special debt to my chief collaborator, Theodore H. Haas, but for whose indefatigable energies a large part of this work must have remained unwritten. I am happy also to acknowledge the loyal aid given by two others who were with the work "for the duration," Mrs. Mima Pollitt and Miss Bettie Renner, both of the Department of Justice.

Because of unfortunate exigencies over which none of us had any control, the aid rendered by other attorneys collaborating in the project was limited in each case to a few weeks or months. I am nonetheless aware of the vital contributions that were made to the writing of this Handbook by Pedro Capo-Rodriguez, whose many years of experience representing the United States in Indian litigation have been of the greatest value in the preparation of this work, and by attorneys Fred G. Folsom, Jr., Abraham Glasser, Mrs. Pauline B. Heller, Thomas L. Karsten, Samuel Miller, Clifford Stearns, and Miss Doris Williamson. Valuable aid in the historical research involved in various portions of this work was given by Miss Mary K. Morris and Miss Lucy M. Kramer. Finally, I should like to acknowledge the part played in the preparation of this work by Mrs. Griselda G. Lobe11 and Mr. Joseph Watson, who checked and filed thousands of items of source material upon which the writing of this work was based.

Those of us who did the actual writing of this Handbook constitute only a small part in the stream of human energies that have influenced the form and content of this work. My associates in the Department of the Interior, particularly Ebert K. Burlew, First Assistant Secretary; Oscar L. Chapman, Assistant Secretary; William Zimmerman, Jr., Assistant Commissioner of Indian Affairs; Frederic L. Kirgis, First Assistant Solicitor; William H. Flanery, Charlotte T. Lloyd, Kenneth Meiklejohn, H. Byron Mock, Phineas Indritz, Marie Berger, and Frances Lavender, Assistant Solicitors; William A. Brophy, Special Attorney for the Pueblo Indians; John R. T. Reeves, General Counsel of the Indian Office; Samuel J. Flickinger, Assistant General Counsel; E. S. McMahon, Attorney; Fred H. Daiker, Assistant to the Commissioner of Indian Affairs; Allan G. Harper, Field Representative; George A. Hossick, Chief of the Alaska Unit of the Division of Game Management, and Seton H. Thompson, Assistant Chief of the Division of Alaska Fisheries, both of the Fish and Wildlife Service; and David E. Thomas, Chief of the Alaska Section of the Office of Indian Affairs, have all contributed in different ways to this work.

Finally I should like to make grateful acknowledgment of the aid given along the many vital steps that lie between writing and publication, by Dr. W. C. Mendènhall, Director of the Geological Survey; William Barton Greenwood, Finance Officer for the Bureau of Indian Affairs; Fred W. Johnson, Commissioner of the General Land Office; Floyd E. Dotson, Chief Clerk of the Interior Department; Frank C. Updike, Chief of the Miscellaneous Service Division; Miss Helen Logan and John H. Ady, in charge of the printing work of the Department; and Miss Marie J. Turinsky and Mrs. Grace L. Dent, to whom the task of proof-reading was entrusted.

Even this lengthy roster, sufficient as it is to dispel any illusory author's pride, is far from representing a complete sum of the human efforts that move through the pages of this volume. To do justice to these efforts one would have to mention the writers of books, articles and briefs, which are quoted at length in these chapters, the judges whose opinions form the backbone of the volume, the administrative officials whose reports and legal

memoranda have proved so valuable in fields not yet covered by the decided cases, the statesmen in the White House, in Congress, and among the Indian tribes whose thoughts have taken form in the language of statute, treaty, and tribal law, which makes up so large a portion of this study, the many critics outside of Government circles who have brought to light defects in Indian law and administration, the critics of preliminary drafts of these chapters who have aided in many successive revisions, and the score or more of clerical and stenographic assistants who have performed many tasks incidental to the preparation of this work. But any such attempt to place on a written page all the names of those on whom one has depended would be inevitably vain. For each of us in his appointed work, in Government service as elsewhere, is the instrument of forces that run through an entire generation. What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equipment of a generation a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields aselsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems. These beliefs represent, I think, the American mind in our generation as it impinges upon one tiny segment of the many problems which modern democracy faces. It is fundamentally to these beliefs and to this mind that an author's acknowledgments, gratitude, and loyalty are due.

(Signed) FELIX S. COHEN.

JULY 1, 1940.