Chapter 15

TRIBAL PROPERTY

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SECTION 1. DEFINITION OF TRIBAL PROPERTY

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

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

¹ See Chapter 20, sec. 3.
² See Chapter 1, sec. 3, fn 70. Even in the Indian school situation, tribal property rights may be created. In Alaska, for instance, reservations for native education have come to be treated, for most purposes, as Indian reservations. See Chapter 21, sec. 7. Similarly, we may note that the Joint Resolution of January 30, 1897, 29 Stat. 698, authorizing the use of the Fort Ridgely abandoned military reservation "for the purposes of an Indian training school," has been construed as establishing an Indian reservation. The Act of January 27, 1913, 37 Stat. 652, refers to "Indians having rights on said reservation."
TRIBAL PROPERTY

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

From time to time, distinguished advocates have upheld what may be called the "menagerie theory" of tribal property, under which no rights whatsoever are vested in the Indian tribe. In every case, however, in which this theory has been presented to the Supreme Court of the United States, it has been rejected. 2

A. TRIBAL OWNERSHIP AND TENANCY IN COMMON

The distinction between tribal property and property owned in common by a group of Indians appears most clearly in connection with the claims repeatedly put forward by descendants of tribal members who are not themselves tribal members and who, under a theory of tenancy in common, would be entitled to share in the common property but, if the property is indeed tribal, have no valid claim thereon. The Supreme Court has made it clear in such cases as Fleming v. McOurtain, 3 and Chipewa Indians of Minnesota v. United States, 4 that where the Federal Government has dealt with Indians as a tribe no tenancy in common is created, and no indiscernible or alienable right accrues to the individual members of the tribe in being at the time the property vests. The fact that the plural form is used in describing the grantee does not show an intent to create a tenancy in common nor does a limitation to a tribe "and their descendants" vest the title in the individual members who, perhaps, held by their heirs, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners. 5

Perhaps all of these differences can be summed up in the conception of tribal property as corporate property. 6

B. TRIBAL OWNERSHIP AND INDIVIDUAL OCCUPANCY

Congress has consistently distinguished between the tribal interest in land and the complementary interest of the individual Indian in improvements thereon. Thus, a long series of congressional acts granting rights-of-way across Indian reservations to various railroad companies contain the specification that damages shall be payable not only to the tribe but to individuals, wherever lands are "held by individual occupants according to the laws, customs, and usages" of the tribe in question. 7 Other right-of-way statutes provide in slightly different

2 Thus Attorney General Crockett, in his opinion in the Partage Cave Case, 8 O. P. A. 255 (1858), declared that the making of treaties with Indians and the references in such treaties to "their lands" were error: on the part of the United States. Today a basic issue of policy in the administration of tribal property is whether the land and water shall be allowed to exercise the powers of a landowner, to receive rentals and fees, to regulate land-use and to withstand land-use privileges from those who do not the tribal regulations; or whether the Federal Government will administer tribal property for the benefit of the Indians as it administers National Enuiuiments, for instance, for the benefit of posterity, with the Indians having perhaps as much actual voice in the former case as posterity has in the latter. F. S. Cohen, How Long Will Indian Constitutions Last? (1939). Ginn & Co., Work N. 10, PP. 40-41.


4 See ibid., p. 60.

terms for damages to individual occupants injured by the granting of such rights-of-way. Under such statutes, it has been said, where one has a base fee, it has been held that he should receive the full value of the land, as the interest of the grantor is too remote to be treated as property. The fee of the territory of the Cherokee Nation is in the possession of the federal government, and the grants to the tribe have no complete right of enjoyment that, when a right of way is condemned, they are entitled to compensation.

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

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

C. TRIBAL LANDS AND PUBLIC LANDS OF THE UNITED STATES

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

Again, it has been held that Indian lands are “public lands” within the meaning of a statute granting a right-of-way to a railroad company across “public lands,” where the United States specifically undertakes to extinguish Indian title on the lands

D. THE COMPOSITION OF THE TRIBE AS PROPRIETOR

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

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

Under this statute the tribal estate was divided between

by the “Executive Department charged with the administration of the act.”

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

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

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

Similarly, it has been held that Indian tribal lands are not covered by statutes opening “public lands” to settlement, nor are they comprised within the mineral laws affecting the public domain.
between a "citizen party" and an "Indian party." the former to receive per capita shares of the tribal funds, and the latter to enjoy exclusive rights in the remaining tribal fund. Members of the "citizen party" were deemed to have made "full surrender and relinquishment" of all claims "to be thereafter known and considered as members of said tribe, or in any manner Interested in any provision heretofore or hereafter to be made by any treaty or law of the United States for the benefit of said tribes . . . ." (Sec. 4.)

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

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

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

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

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

For an account of these arrangements, see United States v. Wilke, 170 U.S. 298 (1901); Chippewa Indians v. United States, 301 U.S. 358 (1937). 80 C. 410 (1935); United States v. Minnesota, 270 U.S. 181 (1926); act of Jan. 1, 1930.

SECTION 2. FORMS OF TRIBAL PROPERTY

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

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


For an account of these arrangements, see United States v. Wilke, 170 U.S. 298 (1901); Chippewa Indians v. United States, 301 U.S. 358 (1937). 80 C. 410 (1935); United States v. Minnesota, 270 U.S. 181 (1926); act of Jan. 1, 1930.

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lands; a) (7) water rights: "(6) rights of internment: " (9) tribal trust funds; (10) accounts payable to tribe."


45 See, for example, Act of June 6, 1900, 31 Stat 672 (Fort Hall); reserving water rights by agreement, where surplus lands were sold on Fort Hall Reservation; Act of March 3, 1903. 32 Stat. 1016 (authorizing the use of tribal funds to purchase water rights for Indian lands on the Wind River Reservation in accordance with the statutes of Wyoming). And see sec. 16 of this Chapter.

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


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


48 See, for example, Act of March 3, 1921, sec. 5. 41 Stat 1355.


SECTION 3. SOURCES OF TRIBAL RIGHTS IN REAL PROPERTY

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

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

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

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

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

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

* * *

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

185 U.S. 373, 389-390 (1902).

SECTION 4. ABORIGINAL POSSESSION

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

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

* * * exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate.

* * * We do not, therefore, deviate from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession. This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania.

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


* W. Wheat., 543 (1823).
The power now possessed by the government of the United States to grant lands, residences, white we were colonies, in the Crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power makes negative the existence of any conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or admitted to the lands we now hold, originates in them. It if a country has been inhabited by its inhabitants were. in no instance, entirety (Pp. 292)

Soil, tribes did not enjoy occupancy. either by purchase or maintain, as all others have maintained, that discovery

The exclusion of other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives. were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded: but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. (Pp. 572–574)

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by conquest: and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.


*6 Pet. 515 (1832).*
But power, war, conquest, give rights which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. (P. 543.)

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

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

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either aboriginal occupants, or those acquired by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not find that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in the McIntosh case by the principle which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally unable to determine their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood. (Pp. 544-545.)

Viewing the problem in these terms, the Supreme Court had no difficulty in reaching the conclusion that a possessory right in the area concerned was vested in the Cherokee Nation and that the State of Georgia had no authority to enter upon the Cherokee lands without the consent of the Cherokee Nation. These views were reaffirmed by the Supreme Court, per Clifford, J., in the subsequent case of Holden v. Joy. *6

Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. *7

*Clarke v. Smith, 13 Pet. 195 (1839); *Lettimer v. Poteat, 14 Pet. 4 (1840); *Seneca Nation v. Chiricahua, 162 U. S. 283 (1896); *The Cherokee and their Lands, 2 Op. A. G. 321 (1830) (holding that Cherokee lands became the property of Georgia upon the migration of the occupants); *Tennessee Land Titles, 30 Op. A. G. 286 (1814) (holding that such lands within the boundaries of the State of Tennessee became the property of that state upon the migration of the Cherokee). *Spalding v. Chandler, 160 U. S. 394 (1896), and see Fletcher v. Peck, 6 Cranch 87 (1810); *Johnson v. McIntosh, 8 W. Heat. 543, 590 (1823); *Cherokee Nation v. Georgia, 5 Pet. 1, 38 (1831); *United States v. Joseph, 94 U. S. 614, 618 (1876), affg. 1 N. M. 593 (1894); *S. L. D. Memo. 236 (New York Indians).

**Mitchel et al. v. United States, 9 Peters, 748.

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

"The answer to this question depends on the character of the title which the Indians retain in these lands. The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest, and from the migratory habits and hunting ways of its aboriginal occupants. (See the authorities cited in Fletcher and Peck, 6 Cranch, 121.) The conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe, to enter upon these lands, for the purpose of making the proposed surveys, without the consent of the Indians, whose title is absolute, subject only to the pre-emption.

It is said that the act of ownership proposed to be exercised by the grantees under the State of Massachusetts will not injure the Indians, nor disturb them in the enjoyment of their lands; but of this the Indians, whose title, while it continues, is sovereign and exclusive, are the proper and the only judges. **

I am of opinion that it is inconsistent, both with the character of the Indian title and the stipulations of their treaty, to enter upon these lands, for the purpose of making the proposed surveys, without the consent of the Indians, "freely rendered; and on a full understanding of the case." (Pp. 466-467.)

Cases and opinions subsequent to the McIntosh case oscillate between a stress on the content of the Indian possessory right and stress on the limitations of that right. These opinions and cases might perhaps be classified according to whether they refer to the Indian right of occupancy as a "mere" right of occupancy or as a "sacred" right of occupancy: All the cases, however, agree in saying that the aboriginal Indian title involves an exclusive right of occupancy and does not involve an ultimate fee.

The cases dealing with Indian lands in the territory of the original colonies locate the ultimate fee in the state wherein the lands are situated. *6 Outside of the territory of the original

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7 The Cherokee and their Lands, 2 Op. A. G. 321 (1830) (holding that Cherokee lands became the property of Georgia upon the migration of the occupants); *Tennessee Land Titles, 30 Op. A. G. 286 (1814) (holding that such lands within the boundaries of the State of Tennessee became the property of that state upon the migration of the Cherokees). *Spalding v. Chandler, 160 U. S. 394 (1896), and see Fletcher v. Peck, 6 Cranch 87 (1810); *Johnson v. McIntosh, 8 W. Heat. 543, 590 (1823); *Cherokee Nation v. Georgia, 5 Pet. 1, 38 (1831); *United States v. Joseph, 94 U. S. 614, 618 (1876), affg. 1 N. M. 593 (1894); *S. L. D. Memo. 236 (New York Indians).
The various ways in which treaty reservations have been established and the different forms of language used in defining the tenure by which such reservations are held, together with the Judicial and administrative interpretations placed upon these phrases, have been noted in some detail in Chapter 3, and need not be restated here. It is enough for our present purposes merely to list (a) the principal ways in which treaty reservations have been established: (b) the principal forms of language used in defining tribal tenure; and (c) the more important rules of interpretation placed upon such phraseology.

A. METHODS OF ESTABLISHING TREATY RESERVATIONS

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

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

Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their ancient titles and possessions that they now enjoy.

A typical treaty fixed a "boundary line between the United States and the Wiadot and Delaware nations." 65 In many treaties the recognition of aboriginal title was coupled, with a cession of portions of the aboriginal domain. Thus, Article 6 of the Treaty of January 31, 1786, with the Shawano Nation 66 provides:

The United States do allot to the Shawano nation, lands within their territory to live and hunt upon, beginning at the mouth of the Wisconsin River, thence due north, and with the southerly line of the Chippewa nation, and with the lands hereby allotted to the Chippewa nation to live and hunt on the same line, as shall be the following . . . *.

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

October 8, 1818, with the Delaware Nation. The first two articles of this treaty provided:

Art. 1. The 'Delaware nation of Indians cede to the United States all their claim to land in the state of Indiana;

Art. 2. In consideration of the aforesaid cession, the United States agree to provide for the Delaware a country to reside in, upon the west side of the Mississippi, and to guarantee to them the peaceful possession of the same.

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

Another type of treaty wherein an aboriginal domain is ceded to the United States in exchange for other lands arises where a particular tribe combines with another and cedes to the United States its land in exchange for the privilege of participating in the reservation privileges accorded the other tribe.

Yet another variation combines the two foregoing basic methods. A typical of this type is that of July 8, 1817, with the Cherokee Nation, wherein it was provided that a portion of the aboriginal lands be ceded in exchange for lands west of the Mississippi but that a portion be retained for those Indians not desirous of migrating west.

(3) A third type of treaty provision for the establishing of reservations, frequently connected with the above two methods, directed the purchase of lands on behalf of the tribe. Generally tribal funds were utilized for such purchase and the purchase was made either from the United States or from another tribe.

A typical provision of this type is the following, taken from the Treaty of March 21, 1866, with the Seminoles:

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

TREATY RESERVATIONS

B. TREATY DEFINITIONS OF TRIBAL PROPERTY RIGHTS

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

(1) In a number of treaties the United States undertakes to grant to the tribe concerned a patent in fee simple. In some cases reference is made to the tribe and their descendants.

In a few cases the terms "patent" and "fee simple" are coupled with language indicating that if the tribe ceases to exist as an entity the land will revert or escheat to the United States. In some cases express provision is made restricting alienation.

Occasionally the language of the ordinary patent or deed in fee simple is embellished with guarantees stressing the permanent character of the tenure, as in, the following language, taken from the Treaty of May 6, 1828, with the Cherokee Nation:

- * * * a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain their forever, in which they shall live forever, in all future time, be embarrased by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *.

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

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

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

- Treaty of September 20, 1816, with the Chickasaw Nation, 7 Stat. 150; Treaty of September 27, 1830, with the Choctaw Nation, 7 Stat. 333 ("in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it"). Treaty of February 28, 1831, with the Seneca Tribe, 7 Stat. 348; Treaty of July 20, 1831, with the mixed Band of Seneca and Shawnee Indians, 7 Stat. 351; Treaty of August 8, 1831; with the Shawnee Tribe, 7 Stat. 355; Treaty of October 11, 1842, with the Confederated Tribes of Sac and Fox, 7 Stat. 596; Treaty of March 17, 1842, with the Wyandott Nation, 11 Stat. 581. * 7 Stat. 188.

- See Chapter 3, sec. 4E.

- Treaty of September 25, 1818, with the Peoria, Kaskaskia, Michigania, Cahokia and Tamarois Tribes of the Illinois Nation, 7 Stat. 181; Treaty of November 15, 1824, with the Quadraub Nation, 7 Stat. 232.

- Treaty of January 24, 1826, with the Creek Nation, 7 Stat. 286. See also Treaty of October 18, 1820, with the Choctaw Nation, 7 Stat. 210 ("whereas it is an important object with the President of the United States, to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging lands for a country, a suitable and secure tract of land on the Mississippi.


- See Chapter 3, sec. 4E.

- Treaty of September 25, 1818, with the Peoria, Kaskaskia, Michigania, Cahokia and Tamarois Tribes of the Illinois Nation, 7 Stat. 181; Treaty of November 15, 1824, with the Quadraub Nation, 7 Stat. 232.
Article 4 of the Treaty of August 18, 1804, with the Delaware Nation recognized the Delawares "as the rightful owners of all the country which is bounded by the said tribe as Indian reservations are usually held)."

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

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

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

C. PRINCIPLES OF TREATY INTERPRETATION

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

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

See Treaty of January 7, 1866, with the Cherokee Nation, 7 Stat. 101, 103 ("and will secure to the Cherokee the title to the said reserved lands").

See Treaty of May 31, 1796, with the Seven Nations of Canada. 7 Stat. 53 ("to be applied to the use of the Indians of . . . . St. Regis").

See Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Potawatamie, and Sac Nations. 7 Stat. 28, 19 ("to live and hunt upon, and otherwise to occupy as they shall see fit").

See Treaty of May 12, 1854, with the Menomonees. 10 Stat. 1064, C. 76. Treaty of September 26, 1833, with the United Nation of Chippewas, Potawatamies and Ottawas. 7 Stat. 431.

See Treaty of October 2, 1818, with the Wea Tribe. 7 Stat. 189 ("to be held by the said tribe as Indian reservations are usually held").

See Treaty of September 29, 1817, with the Wyandot, Seneca, Shawnees, and Ottawa Tribes. 7 Stat. 178 ("and held by them in the same manner as Indian reservations have been heretofore held. But [it] is further agreed, that the tracts thus reserved shall be reserved for the use of the Indians named . . . and held by them and their heirs forever, unless ceded to the United States").

See Treaty of September 29, 1817, with the Wyandot, Seneca, Delaware, Shawnees, Potawatamies, Ottawas, and Chippewy Tribes. 7 Stat. 160 ("grant, by patent, to the chiefs . . . for the use of the said tribe. . . . which tracts, thus granted, shall be held by the said tribe; upon the usual conditions of Indian reservations, as though no patent were issued.")


See Treaty of May 6, 1834, with the Delaware Indians. 10 Stat. 1048. 


SECTION 6. STATUTORY RESERVATIONS

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

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

Frequently the statute uses the phrase "is reserved to the use of the Indians named . . . and held by them and their heirs forever, unless ceded to the United States" for tribes. "For the use of the said tribe. . . . which tracts, thus granted, shall be held by the said tribe; upon the usual conditions of Indian reservations, as though no patent were issued."