WHY DOING BUSINESS ON RESERVATIONS IS UNIQUE

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It takes more than good economic analysis and a winning personality to be successful in business; the transactions must also fit the requirements of the parties. Here are a few unusual aspects of doing business in the context of Indian reservations.

I. WHAT IS A RESERVATION?

Not all Indian reservations are marked on highway maps. Nor can one assume that each Indian tribe possesses a reservation, although most do. *See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 65 Fed. Reg. 13298 (March 13, 2000). In fact, for governmental and business purposes, the term "reservation" is less important than the broader concept of "Indian country," discussed below.

In general, an Indian reservation is a tract preserved for the use of an Indian tribe or individual Indian. In western states, many such tracts were excluded ("reserved") from the operation of the public land laws before statehood and remain in special status.

Formal designation of land as a "reservation" is not necessary to establish reservation status. "Rather, we ask whether the area has been `validly set apart for the use of the Indians as such, under the superintendence of the Government.' "*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), *quoting United States v. John*, 437 U.S. 634, 648-49 (1978). Thus, in *Oklahoma Tax Comm'n*, a convenience store operated on land held in trust for the Citizen Band Potawatomi Tribe which had never been formally designated a "reservation," was held to be validly set apart and thus to qualify as a reservation for tribal sovereign immunity purposes.

For most jurisdictional purposes, the governing legal term is "Indian country" not Indian reservation. Indian country is defined in 18 U.S.C. § 1151 as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the

reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987), the Court noted that the Indian country definition generally governs questions of civil jurisdiction as well as criminal. *See also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (state income and vehicle taxation of tribal members in Indian country prohibited).

In *Alaska v. Alaska Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), the Court rejected arguments that lands selected under the Alaska Native Claims Settlement Act and held in fee status by a federally recognized tribe were Indian country. As illustrated by the factors and cases discussed by the Court and by the Ninth Circuit in the opinion the Supreme Court reversed, 101 F.3d 1286 (9th Cir. 1996), the determination whether particular properties qualify as Indian country, and hence as "reservations" in common parlance, is difficult.

II. TYPES OF LAND TENURE[2]

A. INDIAN TITLE

When doing business with Indian tribes or Indians, particularly on lands held in trust by the United States, the unique nature of Indian land titles must be kept in mind. Indian tribes and Indians can own property in fee simple. In that event, many standard property law concepts apply. However, the variety of land tenures commonly called "Indian title" should be understood before one can effectively engage in business on Indian reservations.

Indian property rights can best be understood in historical perspective. Indians have acquired interests in real property in at least six ways:

a. aboriginal possession;

b. act of a prior government, *e.g.*, a grant from Great Britain, Spain or another country;

c. treaty with the United States;

d. Act of Congress;

e. Executive actions; or

f. purchase.

The Supreme Court explained the origin of Indian title in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). There, the court noted:

It very early became accepted doctrine in this Court that although fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign - first the discovering European nation and later the original States and the United States - a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and a Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

414 U.S. at 667.

Oneida thus recognized two important concepts:

a. "original" Indian occupancy of land constituted a recognizable and protectable title; and

b. that such title could only be extinguished by the sovereign.

The policy of extinguishing Indian title only at the behest of the sovereign was one of the first policies set by the United States Congress after adoption of the United States Constitution. In 1790, the Congress passed the first of many Indian Trade and Intercourse Acts. The first Trade and Intercourse Act declared that no sale of land made by any Indian or Indian tribe would be valid unless "made and duly executed at some public treaty, held under the authority of the United States." Act of July 22, 1790, Ch. 33 § 4, 1 Stat. 137. This first act and other subsequent Trade and Intercourse Acts are now codified at 25 U.S.C. § 177 and are of continuing force and effect. (More on section 177 later.)

The principles of *Oneida* apply throughout the United States and are often critical in determining the possible continuing validity of Indian tribal claims to lands outside reservation boundaries. Both outside and inside reservations federal law determines the existence and effect of Indian titles.

Many reservations were established pursuant to ratified treaties between the United States and Indian tribes. For example, the January 22, 1855 Treaty of Point Elliott, by which tribes conveyed to the United States an area north of Federal Way,

Washington and west of the Cascades, provides at Article 2: "There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land [describing four reservations]." Reservations were also commonly created by Presidential executive orders, between 1871 and 1919. Federal statutes have also often been used to create reservations or to appropriate funds to purchase lands which are later declared to be reservations. Congress halted the use of executive orders to alter reservations in 1927. *See* 25 U.S.C. § 398d.

Another important concept in understanding Indian land tenure and jurisdiction on reservations is the concept of trust responsibility. This concept evolved judicially, first appearing in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). In *Cherokee Nation*, the tribe filed an original action in the Supreme Court to enjoin enforcement of state laws. The Court refused original jurisdiction, finding that the tribe was not a state of the United States nor a foreign state, and thus was not entitled to bring suit directly before the court. Rather, the Court concluded that tribes were "domestic dependent nations" and that their relationship to the United States resembled "that of a ward to his guardian. *"Cherokee Nation* at 17.

From this holding, the trust responsibility doctrine has evolved. That doctrine has been articulated as follows:

Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.

F. Cohen, *Handbook of Federal Indian Law* 220 (1982 ed.). *See also United States v. Mitchell*, 463 U.S. 206 (1983) (statutes and regulations define the contours of the trust).

These three concepts - the viability of Indian title based on aboriginal possession or on treaty or other sovereign acts, the restraint against alienation of Indian title except by proper action of the federal sovereign, and the requirement that the federal sovereign act within a trust relationship duty with respect to Indian lands - have led to a large body of unique law concerning Indian governmental powers and property rights which are of importance in doing business with Indian tribes.

B. FEE TITLE

Indians, as any other citizens, may hold title in fee simple. Property held by an individual in "fee simple" may be sold by the owner essentially without restriction.

In the case of an individual, it may also be passed on by will or gift. Tribes may own land in fee simple even within their own reservations. Tribal ownership is complex because a tribe's relationship to the land is both as an owner of property and as a government and because alienation restrictions not shown on the title may nevertheless apply. In a case of fee simple ownership outside a reservation or on state reservations where trust title (see below) does not apply, a tribe's relationship to the land is more as an owner than as a government. E.g., *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999) (state regulation applied to Navajo tribal property held in fee status outside reservation boundaries).

C. FEE TITLE SUBJECT TO RESTRICTIONS ON ALIENATION

Before discussing "trust title," mention must be made of "restricted fee" lands. This type of fee title is unique to Indians and is granted pursuant to treaty provisions or federal statute. *E.g.*, 25 U.S.C. § 351. Although such title is held by the Indian technically in fee pursuant to a restricted federal patent, dealing with such land is similar to dealing with trust property.

As discussed below, 25 U.S.C. § 177 prohibits sale or encumbrance of tribal land except pursuant to federal law. All lands held by an Indian tribe are subject to restrictions against alienation because of 25 U.S.C. § 177, with a possible exception of certain lands in the Ninth Circuit. *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994). In *Lummi Indian Tribe*, the Ninth Circuit upheld taxation of reservation land that had been assigned to individual tribal members, passed into fee status pursuant to statute, and was repurchased by the Tribe. In *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. Candelaria*, 271 U.S. 432 (1926), the Court applied the restrictions of 25 U.S.C. § 177 to all lands held by tribes. *Lummi Indian Tribe* thus currently represents an exception to the general rule that all lands held by tribes, in fee simple or otherwise, are subject to statutory restraints against alienation. *See* F. Cohen, *Handbook of Federal Indian Law* 520 (1982 ed.); *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993).

In both *Alaska v. Native Village of Venetie*, 522 U.S. 520, n.4 (1998), and *Cass County v. Leach Lake Band of Chippewa Indians*, 524 U.S. 103, n.5 (1998), the United States Supreme Court left open the question whether 25 U.S.C. § 177 restricts lands that have been rendered alienable by Congress and later reacquired by an Indian tribe in fee simple status. The consistent interpretation of the Interior Department is that section 177 applies to all tribal land. "[A]ny . . . land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. § 177.)" 25 C.F.R. § 152.22(b) (1999). The

unsettled scope of section 177 requires that care be taken in transactions affecting tribal fee land.

D. TITLE HELD IN TRUST BY THE UNITED STATES

The more pervasive type of title in Indian country is so-called "trust title." Given the unique relationship of the United States government to Indian tribes and tribal members, the fee title to most Indian property is vested in the United States. Tribes and tribal members have the beneficial ownership only.

The origins of trust title are found in case law as well as statutes. Generally, statutes allotting tribal lands to individual members provided that such allotments would be held in trust for 25 years or more prior to becoming alienable or taxable. The Indian Reorganization Act of 1934 also authorized the Secretary of the Interior to acquire lands for the benefit of Indians, such lands to be taken in the name of the United States in trust for the Indian tribe or individual Indian beneficiary. 25 U.S.C. § 465. The Indian Reorganization Act also recognized preexisting trust title and stated that:

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

25 U.S.C. § 462.

Thus, in dealing with Indian property, it is important to remember that often the fee title to Indian trust property is held by the United States in trust for an Indian tribe, individual or group of individuals. The land cannot be alienated (sold or title otherwise transferred) or encumbered in whole or in part without strict adherence to federal law, including, in virtually all cases, the written acquiescence of the beneficial owner and the fee title owner pursuant to applicable federal regulations and procedures.

E. TAKING LANDS INTO TRUST

The distinction between Indian lands held in trust by the United States and other lands held in fee simple by a tribe or individual Indian is sometimes important for jurisdictional purposes, and particularly so for immunity from state and local taxation. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). States often lack civil regulatory jurisdiction over activities conducted within Indian country regardless of the trust status of a particular parcel. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Thus, for legal reasons as well as to meet the needs of the parties, it is often desirable

to change the status of economic development project lands from ordinary fee simple ownership to federal property held in trust for an Indian tribe, particularly if the lands lie outside existing reservation boundaries.

The Secretary of the Interior is vested by statute with broad discretionary authority to accept land in trust status for individual Indians and Indian tribes within or outside existing reservation boundaries. *E.g.*, 25 U.S.C. §§ 465, 1466, 2203. The procedures are set forth in 25 C.F.R. Part 151. Section 151.3(a) of the regulations provides:

[L]and may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

The popularity of casino gaming produced many requests in the 1980s to have lands placed in trust to facilitate Indian gaming ventures. However, in the Indian Gaming Regulatory Act of 1988, Congress prohibited certain gaming on lands taken into trust after the date of enactment. 25 U.S.C. § 2719(a). That prohibition, however, does not apply to some tribes and is subject to certain exceptions including the provision that "[n]othing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

In *Siletz Indians of Oregon v. United States*, 841 F. Supp. 1479 (D. Or. 1994), a tribe challenged the Secretary of the Interior's refusal to place off-reservation land in trust to establish a gaming operation without the Governor's concurrence. The district court held that the Indian Gaming Regulatory Act required approval of the State Governor before the Secretary could take such lands in trust but concluded that because that provision violated the appointments clause and separation of powers principles, 25 U.S.C. § 2719(b)(1)(A), concerning taking of off-reservation land in trust for gaming, is invalid.

The Court of Appeals reversed, *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir.), *cert. denied*, 522 U.S. 1027 (1997). The court held that (1) the governor's concurrence provision was a valid delegation of legislative authority; (2) the governor did not exercise significant authority under IGRA and did not have primary responsibility for protecting federal interests; and (3) the trust application was correctly denied.

In 1990, the Secretary of the Interior halted acquisition of lands in trust status that are located outside of and non-contiguous to a tribe's existing reservation

boundaries. To varying degrees, regional offices of the Bureau of Indian Affairs subsequently resumed taking land into trust under amended regulations set forth in 25 C.F.R. Part 151. On April 12, 1999, the Interior Department published proposed regulations to again amend the procedure for taking lands into trust for Indian tribes and individuals. 64 Fed. Reg. 17574. Many tribes commented in opposition to what they saw as efforts to make trust land acquisitions more difficult. Although the comment period has closed, final regulations have not yet been published.

In *South Dakota v. Department of Interior*, 69 F.3d 878 (8th Cir. 1995), the court held that the primary federal law permitting the Secretary of the Interior to take lands into trust for Indians, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power. That decision responded to the difficulty of obtaining judicial review of a decision to take land into trust after the land had already passed into trust and became subject to an exception in the Quiet Title Act that protects Indian trust property. 28 U.S.C. § 2409a. In an odd decision, the Supreme Court granted *certiorari*, reversed the Eighth Circuit's decision, and vacated its opinion because the Interior Department amended its regulations to clarify that, at least 30 days prior to taking lands into trust, the Secretary will publish a notice in the Federal Register that a final agency determination has been made. *Department of the Interior v. South Dakota*, 117 S. Ct. 286 (1996); *see* 25 C.F.R. § 151.12. Justices Scalia, O'Connor and Thomas dissented.

III. INDIAN PROPERTY OWNERS

Indian property may be held by the tribe as communal property, by individuals or groups of individuals, or by numerous heirs of an original allottee (so-called "fractionated heirship lands").

A. TRIBAL OR COMMUNAL PROPERTY

Title to trust property within or without an Indian reservation, unless allotted (transferred) to an individual or otherwise partitioned or sold, is held by the United States in trust for the tribe as an entity and is not held by tribal members individually. *The Cherokee Trust Funds*, 117 U.S. 288 (1886). In *The Cherokee Trust Fund* case, the Supreme Court stated that while the lands were held in communal ownership, that did not ". . . mean that each member had such an interest, as a tenant in common, that he could claim a pro rata proportion of the proceeds of sales made of any part of them." *Id*. at 308.

This means that an individual member of a tribe has no right to any specific part of tribal property unless (a) there is a specific federal law or treaty which grants rights

to individual members, or (b) there is an assignment to an individual pursuant to tribal law.

The rights of an individual member of a tribe in tribal lands depend on particular treaties, statutes, tribal laws, decisions and contractual agreements involving the tribe's affairs, and generalizations should not be relied upon to govern a specific case.

B. INDIVIDUAL OWNERSHIP AND "ALLOTMENTS"

Individual Indians or groups of Indians can also own trust property. This may occur by purchase of trust property from a tribe or other individual pursuant to specific language in a treaty or statute. This could also occur when the individual Indian has received trust or other title directly from the government by way of an allotment of a portion of a larger tract of tribal land or of other federal lands. An Indian may also inherit trust property from another Indian by will or descent.

Allotments were the method by which the government parceled out communal tribal land to individual Indians. The policy reasons for this ranged from a sincere desire to benefit Indians through ownership to "thinly veiled desires to obtain Indian land." Regardless of the rationale, the results of allotment acts were an enormous loss of land held by Indian tribes and individuals. Almost 90 million acres of tribal land, about 2/3 of the total acreage held by tribes in 1887, were lost by 1934 as a result of the allotment policy. F. Cohen, *Handbook of Federal Indian Law* 614 (1982 ed.).

The most sweeping allotment statute is the General Allotment Act, also known as the "Dawes Act." Chapter 119, 25 Stat. 388 (1887). The Act, now codified at 25 U.S.C. § 331 and various other sections of Title 25, basically allowed the government to distribute individual tracts of tribal lands to individual Indians and arrange the sale of the remainder. Although the General Allotment Act provided for an initial trust period of 25 years, that has been regularly extended by Executive Order or by specific language in other statutes dealing with particular situations. *See e.g.*, 25 U.S.C. § 462. Creation of new allotments on most reservations ended in 1934. *See* 25 U.S.C. §§ 461, 478.

C. FRACTIONATED HEIRSHIP PARCELS

A special problem is presented by trust lands which have passed upon death to heirs of the decedent. There is no comprehensive federal Indian probate law, but federal law does govern the probate, devise and descent of trust property. If an Indian dies without a will, all heirs under state intestacy rules, may be entitled to share in real property owned by the decedent. Increasingly fractionated shares in trust property

have resulted as ownership of an allotment descends to succeeding generations. *See* 25 U.S.C. § 348. This has resulted in the ownership rights in property being divided into literally thousands of parts with no one owner holding beneficial title to more than a tiny undivided fraction of the whole.

Although the ownership of fractionated trust land is theoretically no different from the ownership of trust land by an individual, the extremely small fractions and large number of beneficial owners have created serious practical problems in the administration and beneficial use of allotments. *See Hodel v. Irving*, 481 U.S. 704 (1987); Williams, *Too Little Land, Too Many Heirs - The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709 (1971). Congress addressed the problem in the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2201 *et seq*., but a complete remedy remains elusive. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994).

After the Supreme Court struck down one escheat provision of the Indian Land Consolidation Act in *Hodel v. Irving*, 481 U.S. 704 (1987), new litigation arose concerning an amended provision that sought to enable tribes to acquire tiny fractional interests in trust land. Unfortunately, the Court also rejected the amended provision of the ILCA, *Babbitt v. Youpee*, 519 U.S. 234 (1997). On September 15, 1990, Senator Campbell introduced S. 1586, another proposed effort to reduce the fractionated ownership of Indian lands.

IV. CONVEYANCE OF LESS THAN FULL TITLE

As with any other property, less than full title to Indian property may be conveyed by leases, grants of rights-of-way or sale of natural resources such as minerals and timber from the land. These activities are subject to specific federal rules which usually require the acquiescence of both the beneficial owner and the United States government. Here, generalizations are also dangerous because specific treaties, laws and regulations often govern a particular tribe or individual situation. In addition, a specific tribe's own organic law - its constitution and by-laws - will also affect alienability. With this in mind, a few general principles can be explored.

A. LEASES

Generally, leasing of Indian lands is prohibited except to the extent expressly permitted by Congress. *See* 25 U.S.C. § 177. However, Congress has passed numerous leasing acts of both general and special application to trust land. Most non-agricultural surface leasing today is conducted pursuant to 25 U.S.C. § 415, which, for most tribes, allows a 25-year lease with an option to renew for 25 years. Numerous special statutes extend this time for varying periods. *See, e.g.*, 25 U.S.C. § 403a.

When Indian property is leased, such leases should carefully incorporate provisions of approved leasing forms used by the government and receive the written approval of the Bureau of Indian Affairs. 25 C.F.R. Part 162. The regulations authorize leases that enable the lessee to encumber his leasehold interest for the purpose of borrowing capital. In *Red Mountain Mach. Co. v. Grace Investment Co.*, 29 F.3d 1408 (9th Cir. 1994), the court upheld the application of state law to enforcement of a lender's rights against the interests of the lessee. The Indian Reorganization Act clearly grants tribal governing bodies the right to prevent the lease of tribal lands without the consent of the tribe. 25 U.S.C. § 476.

B. RIGHTS-OF-WAY

Rights-of-way over Indian land may be granted only by strict compliance with specific federal statutes. E.g., *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). *See generally* 25 U.S.C. §§ 311-328. 25 U.S.C. § 323 empowers the Secretary of the Interior to grant rights-of-way for "all purposes" across both communal lands and individual lands. The consent of all beneficial owners is generally required, unless specific exceptions are met. 25 U.S.C. § 324. *See also* 25 C.F.R. Part 169.

C. LICENSES

A tribe may grant permission, with or without conditions, to enter upon and use tribal lands. In the context of fish and game resources comprehensively regulated by federal and tribal programs, both Indians and non-Indians may obtain rights under tribal licenses that are not available under state law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Attempts are sometimes made to distinguish between a license or permit to use property and a lease which would require full adherence to federal requirements and Secretarial approval. While the theoretical distinction between the creation of a lease and license is possible, parties should be cautious in drawing such distinctions.

A purported right-of-way across reservation lands was invalidated because federal legal requirements were not met in *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). There, the District Court held that a revocable license was implied from long continued use of an invalid right-of-way. The Ninth Circuit reversed, noting that the 1880 agreement purported to grant a right-of-way "forever." Although the Ninth Circuit did not hold that Indians could never give a license to use land, the case serves as an important caution against attempts to do so in the right-of-way context.

D. MINERAL LEASES

Generally, unallotted lands within any Indian reservation may be leased for mining purposes, including oil and gas. *See* 25 U.S.C. §§ 396a-396g; §§ 2101-2108. These statutes and the accompanying regulations, at 25 C.F.R. Subchapter I, are complex and should be consulted carefully by any tribe with its counsel. Individual allotted lands may also be leased for mining purposes pursuant to 25 U.S.C. § 396 and applicable regulations.

E. TIMBER

Indian tribes enjoy the equitable ownership of timber located upon reservation lands held by the United States in trust for the tribe. In *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), the Supreme Court held that even where a treaty did not mention timber, the right to use and harvest timber located on land reserved by the tribe was also reserved.

Generally, Indian tribes or individual Indian allottees may not sell or otherwise alienate timber without the approval of the Secretary of Interior. Currently, timber on unallotted lands of any Indian reservation may be sold pursuant to strict restrictions and with the approval of the Secretary of the Interior. 25 U.S.C. §§ 406-407; 3101-3120. Detailed regulations govern these sales as well as sales of timber on allotted lands. *See* 25 C.F.R. Parts 163-165. An individual Indian may cut timber on his own land without federal permission if it is for his personal use. 25 C.F.R. § 163.27.

F. MORTGAGES

1. Allotments

Individual Indian allotments may be encumbered by a mortgage, deed of trust or contract of sale pursuant to special federal authorization. 25 U.S.C. § 483a; 25 C.F.R. § 152.34. Such encumbrances must be accomplished pursuant to specific federal regulatory requirements and on properly approved government forms.

2. Tribal Lands

Federal restraints on alienation and the inability of states and counties to transfer title by foreclosure sale or deed of trust means that tribes are precluded from giving mortgages on tribal land unless specifically authorized to do so. F. Cohen *Handbook of Federal Indian Law* 520 (2nd ed. 1982). However, specific statutes authorize some mortgages. *E.g.*, 25 U.S.C. § 610c (Swinomish Tribal Community); § 642 (Hopi Industrial Park).

Some mortgage authorization is found in Section 17 of the Indian Reorganization Act which authorizes tribes, through corporations chartered by the Secretary of the Interior, to encumber tribal property. *See* 25 U.S.C. § 477. However, many tribes are not incorporated; or if incorporated, do not operate under a Section 17 federal charter, but rather under authorization issued pursuant to their general governmental authority.

V. PROHIBITED TRANSACTIONS: THE INDIAN TRADE AND INTERCOURSE ACT

A. PROHIBITION AND STATUTORY EXCEPTIONS

The first Act of Congress that specifically defined substantive rights and duties in the field of Indian affairs was the Act of July 22, 1790 which regulated, among other things, the conduct of licensed traders and the sale of Indian land. As currently codified in 25 U.S.C. § 177 it provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The consequences to New England landowners of 18th and 19th century land transactions between tribes and non-Indians are, perhaps, one of the best-known aspects of federal Indian law. *See e.g., Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985). Less well known are the situations in which Congress has relaxed the prohibition of section 177 and permitted conveyance of lands or certain incidents of title by tribes.[3] Transactions entered into in compliance with these statutes satisfy the requirements of the Trade and Intercourse Act. However, the prohibition of section 177 is interstitial and bars modern conveyances not authorized by the post-1790 statutory methods.

B. EXCEPTIONS FOR INTER-INDIAN AND INDIAN ENTERPRISE TRANSACTIONS

Since 25 U.S.C. § 177 was intended primarily to prevent non-Indians from purchasing Indian lands without congressional approval, an inter-tribal treaty whereby a tribe ceded half of its interest in lands to another tribe was not invalid for lack of congressional sanction. *United States v. Emigrant New York Indians ex rel. Danforth*, 177 Ct. Cl. 263 (1966). In addition, tribal constitutions often authorize tribal land assignment ordinances under which assignments or leases of tribal land may be made to Indians subject only to tribal approval, not approval by the Secretary of Interior. Thus, there is more flexibility accorded Indian-to-Indian transactions than there is to

Indian-to-non-Indian conveyances. *But see Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D.C. Mass. 1978), *aff'd* 592 F.2d 575 (1st Cir. 1979), *cert. denied* 444 U.S. 866 (1979) (language of section 177 has no exception for land conveyance from a tribe to an individual Indian).

Efforts to increase housing and home ownership on Indian reservations have produced a series of federally-related mortgage programs to benefit individual Indians. In 1985, HUD established the FHA section 248 mortgage insurance program for Indian borrowers residing on leaseholds on trust land. The 248 Program avoids the "marketable title" requirement of similar FHA programs. It does require a residential ground lease and mortgage instrument approved by HUD and the BIA. The lease must contain a provision requiring tribal consent to any transfers of the lease except where the leasehold is obtained by HUD through foreclosure or assignment in lieu of foreclosure.

Congress created the Indian Housing Loan Guarantee Program under section 184 of the Housing and Community Development Act of 1992. *See* 12 U.S.C. § 1715z-13a. Section 184 establishes a loan guarantee fund authorizing general appropriations to the fund, to increase private financing to Indian families, tribes and Indian housing authorities. Under the 248 Program, lenders have the option to pursue foreclosure and re-sell the property, subject to restrictions against alienation, or assign the loan to HUD.

In 1996, Congress passed the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. § 4101. NAHASDA consolidates existing federal Indian housing programs into block grants and, among other things, extends the maximum residential lease term on trust lands to 50 years.

In *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.C.D.C. 1987), the pueblo assigned certain tribal lands to its Santa Ana tribal enterprise to avoid the 25 U.S.C. § 415 requirement of approval by the Secretary of Interior for leases of tribal land. In the ensuing litigation the Secretary did not dispute that assignment of tribal lands to the enterprise conveyed no interest to non-Indians, and therefore that part of the proposal did not need his approval. However, the *Santa Ana* court criticized the pueblo's attempt to treat the enterprise as a tribal entity for purposes of the lease agreement (assignment) while arguing that the enterprise was <u>not</u> a tribal entity for the purpose of approval by the Secretary of the Interior of a different agreement under 25 U.S.C. § 81.

Whether or not a tribal enterprise will be able to convey interests in land at all, or especially without approval of the Secretary of the Interior, generally depends on (1) the terms of the charter or other authority under which the tribal enterprise was

created; (2) whether the tribal enterprise is recognized as an entity distinct from the tribe itself; and (3) the terms of the lease or other agreement under which the tribal enterprise obtained the property which is sought to be conveyed or encumbered.

In section 17 of the Indian Reorganization Act as amended, Congress granted broad powers to tribal corporations chartered under that section to use tribal property:

The Secretary of the Interior may, upon petition of any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477, *as amended* May 24, 1990, Pub. L. 101-301, § 3(c), 104 Stat. 207. Thus, section 17 corporations are largely freed of the restrictions of section 177.

Where the tribal enterprise is <u>not</u> a corporation chartered under section 17 of the IRA, however, 25 U.S.C. § 177 places substantial limits on the ingenuity of tribal counsel and the developer. In addition to the ability to mortgage or lease restricted lands, there are many other considerations, particularly tax considerations, concerning the use of section 17 corporations or corporations established under tribal law. For example, Revenue Ruling 94-16 holds that the business income of section 17 corporations is exempt from federal income taxation, but it does not address the taxability of corporations formed pursuant to tribal law. In addition, the Internal Revenue Service has revamped its rules for determining what entities must be treated as corporations for tax purposes. In 26 C.F.R.§ 301.7701-2(b), the regulations list those entities that must be classified as corporations if they are recognized as separate entities for federal tax purposes, and include "entities organized under a Federal or State statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic." While tax considerations are beyond the scope of this paper, a practitioner should be aware of them.

VI. <u>CONTRACTS RELATIVE TO LANDS OF INDIAN TRIBES OR INDIANS</u>

A. BACKGROUND REQUIREMENTS

Provisions requiring that certain agreements with Indians or Indian tribes be approved by the Secretary of the Interior or his authorized delegate have long been a feature of federal Indian law. Until 1958, contracts with tribes had to be executed before a judge. Until March 14, 2000, a very broad requirement of federal approval of Indian contracts was contained in 25 U.S.C. § 81. That provision declared that no agreement with any tribe of Indians "relative to their lands, or to any claims" would be valid absent compliance with certain formalities and approval of the Secretary of the Interior. Section 81 was enacted by Congress with the intent to protect the Indians from "improvident and unconscionable contracts." *In Re Sanborn*, 148 U.S. 222, 227 (1893). The language of the statute concerning which agreements require approval, however, was difficult to parse and potentially very sweeping.

After discussing two of the early Supreme Court decisions concerning section 81, Felix Cohen wrote:

While the foregoing cases leave some doubt as to the exact scope of the statute, it is at least clear that the statute applies only to contracts with Indians "relative to their lands, or to any claims" and does not apply to matters not comprised within these two categories.

Felix S. Cohen's *Handbook of Federal Indian Law* 281 (1942 ed.). However, what was clear to Felix Cohen has been less than clear to practitioners and the BIA; both have struggled with the phrase "relative to their land" in recent years. Further, contracts of the character described in 25 U.S.C. §177 were not approvable under the general authority of section 81. 18 Op. Atty. Gen. 235 (1885).

The federal courts found section 81 applicable to most agreements with tribes. Old section 81 was thus a major barrier to Indian economic development agreements. *See Mission Indians v. Amer. Mgmt. & Amusement, Inc.*, 824 F.2d 710, 723 (9th Cir. 1987); *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985); *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Barona Group of the Capitan Grande Band of Mission Indians v. American Management and Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987); *Confederated Tribes of the Colville Reservation v. Stock West, Inc.*, 15 Indian L. Rep. 6019 (Colville Tribal Court May 2, 1988); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989); *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S.Ct. 621 (1993).

In 1992, Congress limited section 81 for tribes participating in the Tribal Self-Governance Demonstration Project. *See* Pub. L. 100-472, § 301 *etseq*., 25 U.S.C. §

450f note. Specifically, Pub. L. 102-184, 105 Stat. 1278, amended section 303(d) of Pub. L. 100-472 by providing:

[F]or the term of the authorized agreements under this title, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title.

In 1994, the exemption from section 81 became available for all contracts entered into in connection with contracts and compacts under Pub. L. 93-638, as amended by Pub. L. 103-413. *See* 25 U.S.C. § 450*l*(c)(15)(A) and 25 U.S.C. § 458cc(h)(2). Contracts with attorneys have long been held subject to section 81. However, under the developing case law, many other "professional contracts" with tribes might not be subject to section 81 because they might not be "relative" to Indian lands. Nevertheless, this provision makes clear the inapplicability of section 81 for Indian tribes participating in Tribal Self-Governance or entering into agreements pursuant to contracts under Title I of Pub. L. 93-638.

In addition, the Bureau of Indian Affairs began the practice of granting "accommodation approval" to agreements which might or might not be subject to section 81. This procedure usually took the form of a paragraph added to the conclusion of an agreement with a tribe or a tribal enterprise along the following lines:

The tribe has submitted this agreement for approval under 25 U.S.C. § 81. We doubt whether section 81 applies to this contract. However, the tribe insists that the contract be reviewed, and we would not want our refusal to approve it to subject the contract to an assertion that it is null and void. Not wishing to disrupt the tribe's legitimate contracting activity, we have accommodated its wishes by reviewing this contract and approving the same.

Finally, however, on March 14, 2000, President Clinton signed Public Law 106-179 which totally re-wrote 25 U.S.C. § 81.

B. NEW LAW NARROWS CONTRACT APPROVAL REQUIREMENTS

Pub. L. 106-179 is called the Indian Tribal Economic Development and Contract Encouragement Act of 2000. It provides:

SEC. 2. CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES.

Section 2103 of the Revised Statutes (25 U.S.C. 81) is amended to read as follows:

(a) In this section:

(1) The term 'Indian lands' means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term 'Secretary' means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract--

(1) violates Federal law; or

(2) does not include a provision that--

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b).

(f) Nothing in this section shall be construed to--

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

SEC. 3. CHOICE OF COUNSEL.

Section 16(e) of the Act of June 18, 1934 (commonly referred to as the 'Indian Reorganization Act') (48 Stat. 987, chapter 576; 25 U.S.C. 476(e)) is amended by striking, 'the choice of counsel and fixing of fees to be subject to the approval of the Secretary'.

Under the new law, only agreements or contracts with tribes that encumber Indian lands (defined as trust or restricted lands) for a period of seven or more years will require the approval of the Secretary. Section 81, as revised by Pub. L. 106-179, does not apply to tribally owned fee lands or to agreements of less than seven years. However, the new law certainly implies that contracts approved under section 81 may encumber Indian trust and restricted lands. How that will be reconciled with the broad prohibition of 25 U.S.C. § 177 remains to be seen.

Pub. L. 106-179 provides that the Secretary shall refuse to approve an agreement covered by the Act if the agreement violates federal law or if the agreement does not (1) provide for remedies in case of breach of the agreement or contract; or (2) refer to a tribal code or ordinance or court ruling that discloses tribal sovereign immunity as a defense; or (3) does not include an express waiver of tribal sovereign immunity or limited waiver of sovereign immunity. Tribes already usually must provide some remedies or waiver to contracting parties as a condition of entering into commercial agreements. So, these requirements will have little effect on current practice.

Pub. L. 106-179 requires that the Secretary issue regulations within 180 days of enactment identifying types of agreements that are exempt from this law. The development of those regulations should be monitored closely, and appropriate comments made to make sure that secretarial approval is limited to those situations that Congress clearly intended.

Finally, Pub. L. 106-179 amends the Indian Reorganization Act provision requiring that attorney contracts with Indian tribes must be approved by the Secretary. Also, with the amendment of section 81, attorney contracts with non-IRA tribes are

exempt from secretarial approval. However, many tribal constitutions require secretarial approval of attorneys' contracts. These statutory changes do not change the tribal constitutional provisions; however, it will remove BIA's objection to amendments of tribal constitutions that take out an approval requirement.

VII. GOVERNMENTAL JURISDICTION ON INDIAN RESERVATIONS

Indian tribes are governmental entities whose authority predates the formation of the United States and the states. Tribes generally exercise inherent sovereignty and also exercise powers expressly delegated by the federal government or the states. A description of civil and criminal jurisdiction on Indian reservations is beyond the scope of this paper; however, a few guidelines would be useful. A more detailed analysis may be found in T. Schlosser, Tribal Civil Jurisdiction Over Nonmembers (March 2000) http://www.msaj.com/papers/trbciv~1.htm.

On their reservations, Indian tribes generally exercise all of their inherent sovereign powers except to those removed by treaty or act of Congress, or those implicitly divested by virtue of their dependent status. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no tribal criminal jurisdiction over non-Indians). Tribal powers implicitly divested are those which are "inconsistent with the overriding interests of the National Government, as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980), *citing Oliphant* at 208-10, and *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

The Supreme Court has said that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981). The *Montana* court also noted:

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566.

The Supreme Court has recognized that tribes' "power to exclude" nonmembers may also serve as a basis for civil jurisdiction. The power to exclude is a good, but less strong, argument for tribal regulatory authority than inherent tribal sovereignty.

As the beneficial owners of tribal land, tribes have the ". . . power to exclude nonmembers entirely or to condition their presence on the reservation . . . ." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *see also Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). In addition to the tribal power of exclusion, various congressional enactments prohibit entry of nonmembers to settle, graze, trespass, hunt, fish, trap or cut trees. *See, e.g.*, 25 U.S.C. §§ 179-180; 18 U.S.C. § 1165; 18 U.S.C. § 1853. Some treaties explicitly recognize tribal powers to exclude nonmembers.

The Supreme Court in *Merrion v. Jicarilla Apache Tribe*, described the power to exclude as follows:

Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on-reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.

455 U.S. at 144.

When a tribe enters into consensual commercial relationships with a nonmember, the tribe "retains 'inherent power to exercise civil authority over the conduct of [the nonmember] on fee lands within its reservation.'" *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985), *quoting Montana*, 450 U.S. at 565-66. The tribe's inherent power also includes the right to regulate conduct of non-Indians on fee lands which threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id*. at 479.

A related, although conceptually separate, issue concerns the extent of state jurisdiction in Indian country or on reservations. The Supreme Court has developed two independent, but related, tests or "barriers" of "preemption" and "infringement" to determine the validity of the exercise of state jurisdiction over non-Indians on reservations. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). The Court has also said that these jurisdictional tests apply to questions of state jurisdiction over Indians. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Whatever the exact scope of these tests, the basic inquiry is to determine which government--state or tribal--has the greater interest in the activity sought to be regulated or taxed.

Whenever Congress or the Executive have previously regulated an area of Indian affairs, "[s]tate jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Cabazon*, 480 U.S. 202, 216, *quoting New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

The second barrier, infringement, ousts state jurisdiction when its exercise infringes "'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain*, 448 U.S. at 142, *quoting Williams v. Lee*, 358 U.S. 217, 220 (1959).

These barriers "are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable." *White Mountain*, 448 U.S. at 136. They are related, however, because in assessing the validity of asserted state jurisdiction, courts conduct a "particularized inquiry" to balance the respective interests of the federal, tribal and state governments. *Id*. at 145; *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838 (1982). In the balancing process, the deeply ingrained notions of Indian sovereignty and self-government serve as the "backdrop" against which vague federal enactments must be measured. *White Mountain*, 448 U.S. at 143; *Ramah*, 458 U.S. at 837; *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

Two cases illustrate the way in which federal preemption affects doing business with tribes. In *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), the court held that federal statutes and regulations regarding Indian timber had the effect of preempting California's timber yield tax which was imposed on a non-Indian purchaser doing business outside the reservation. That decision reconciled the Supreme Court's ruling in *White Mountain*, discussed above, with the Court's subsequent decision in *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), a case in which the Supreme Court upheld state taxation of reservation oil and gas production by non-Indian lessees.

Outside the tax context, *In Re Blue Lake Forest Products*, 30 F.3d 1138 (9th Cir. 1994), shows the preemptive force of federal regulations on the Uniform Commercial Code. There, a secured creditor argued that Indian reservation logs were in the inventory of an off-reservation mill and became subject to the bank's security interest under provisions of UCC § 2-403, which allow a person with voidable title to transfer a good title to a good faith purchaser for value. The bank argued that the Tribe's retention of title in the logs was limited in effect to a security interest under UCC § 2-401. However, the court held that federal interests prevailed over state interests in the regulation of timbering on Indian reservations. Therefore, to the extent

there was a conflict between state commercial law and federal laws affording heightened protection to Indian trust timber, the former had to give way.

Special land tenure, federal approval requirements and unique patterns of governmental jurisdiction are some of the unusual aspects of doing business on Indian reservations. Tax and immunity aspects of Indian tribal businesses are covered in T. Schlosser, Sovereign Immunity-Should The Sovereign Control The Purse? (October 1998) http://www.msaj.com/papers/doc0831.htm and T. Schlosser, Taxation of Businesses in Indian Country (March 1996) http://www.msaj.com/papers/taxes.htm. In addition, dispute resolution planning must consider the probability of Indian tribal court jurisdiction and the possibility of state and federal jurisdiction. Doing business on Indian reservations is a fascinating legal and cultural experience.

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3. *See* 25 U.S.C. § 311 (public highways); §§ 312-318 (railroad, telegraph, telephone line rights-of-way, and town site stations); § 319 (telephone and telegraph rights-of-way); § 320 (railway reservoirs or materials); § 321 (pipeline rights-of-way); § 323 (rights-of-way for any purpose); §§ 396a-396g (leases for oil and gas, mining and permits to prospect); § 399 (leases for mining purposes); § 407 (sales of timber from unallotted lands); § 415 (leases of tribal land for public, religious, educational, recreational, residential or business purposes); §§ 2101-2108 (mineral agreements).