

Tulsa Law Review

Volume 29
Number 2 *Native American Symposia*

Volume 29 | Number 2

Winter 1993

Oklahoma Indian Titles

D. Faith Orlowski

Robbie Emery Burke

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

D. F. Orlowski, & Robbie E. Burke, *Oklahoma Indian Titles*, 29 *Tulsa L. J.* 361 (1993).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol29/iss2/16>

This Native American Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

OKLAHOMA INDIAN TITLES

D. Faith Orlowski†
Robbie Emery Burke‡

I. INTRODUCTION	362
II. INDIAN TITLES DERIVED THROUGH THE FIVE CIVILIZED TRIBES	363
III. INDIAN TITLES DERIVED THROUGH THE OSAGE NATION	367
IV. INDIAN TITLES DERIVED THROUGH THE GENERAL ALLOTMENT ACT.....	369
RECENT CASES UNDER THE GENERAL ALLOTMENT ACT	374
APPENDIX A	376
USEFUL RESEARCH MATERIALS	376
APPENDIX B.....	378
SUMMARY OF PRIMARY ACTS OF CONGRESS DEALING WITH RESTRICTIONS OF ALIENATION FOR THE FIVE CIVILIZED TRIBES	378
SUMMARY OF PRIMARY ACTS OF CONGRESS RELATING TO THE OSAGE NATION	380
SUMMARY OF PRIMARY ACTS OF CONGRESS RELATING TO INDIAN ALLOTMENTS UNDER THE GENERAL ALLOTMENT ACT.....	381

† Ms. Orlowski is a shareholder, director and member of the management committee of Sneed, Lang, Adams & Barnett, P.C., Tulsa, Oklahoma. B.A. 1975, J.D. 1978, University of Texas in Austin. Her practice is concentrated in the areas of oil and gas and property law.

‡ Ms. Burke is a shareholder/director of Sneed, Lang, Adams & Barnett, P.C., Tulsa, Oklahoma. B.A. 1974, University of Oklahoma; J.D. 1981, University of Tulsa. Her practice has emphasis in the area of property law including oil and gas, real estate, probate and estate planning.

I. INTRODUCTION

The name, "Oklahoma," means red people.¹ Initially, the entire area of the state of Oklahoma was set aside as Indian land.² In 1889, the western part of Oklahoma was opened to non-Indian settlers and title to most of those lands is derived from federal patents.³ Title to lands in eastern Oklahoma, in contrast, stems from allotments to individual tribal members pursuant to three general legislative schemes:

1. The treaties and statutes governing the lands of the Five Civilized Tribes, i.e., the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes;
2. The treaties and statutes governing the lands of the Osage Nation; and
3. The General Allotment Act which applies to all other tribes.⁴

The general theme of Oklahoma Indian titles is that the federal government imposed restrictions on alienation of Indian lands to protect the Indian allottees. The legal basis for the federal government's control of Indian lands is found in the Constitution of the United States. The federal government has complete jurisdiction over Indian tribes and their lands pursuant to Article I of the Constitution of the United States:

The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with Indian Tribes⁵

From the formation of the United States, the federal government held fee title to Indian lands as "guardian" for the tribes, subject to the right and use of the tribes. The Oklahoma Enabling Act and the Supremacy Clause found in Article II of the Constitution of the United States protected this federal power when the state of Oklahoma was formed.

Indian titles necessitate attention to detail and research in the several treatises on Indian land law.⁶ Title examiners typically suffer more over "Indian Law" than any other area of their practice. The

1. Bill Sampson, *State Indian Heritage a Rich Blend*, THE TULSA TRIB., May 26, 1982, at 1B.

2. Lewis G. Mosburg, Jr., *Transfers of Title to Indian Lands*, in 1 OKLAHOMA TITLE PRACTICE 177, 180 (Lewis G. Mosburg, Jr., ed. 1977).

3. Richard Cleverdon, *Introduction to and Overview of Indian Land Titles*, in A "NUTS AND BOLTS" SERIES SEMINAR: TITLE EXAMINATION BASICS 2 (March 9, 1984).

4. *Id.* at 1.

5. U.S. CONST. art. II.

6. See Appendix "A" for research information.

laws are complex, have frequently been changed, and are not codified in the usual manner which makes research difficult. Slight violations of an Indian restriction nullify the transaction.

II. INDIAN TITLES DERIVED THROUGH THE FIVE CIVILIZED TRIBES

The lands allotted to the Five Civilized Tribes are approximately the eastern half of Oklahoma with the exception of Osage County, which was allotted to the Osage Tribe, and a small area in northeast Oklahoma which was allotted to the Quapaws, Delawares and a few other tribes.⁷ The allotment scheme for the Five Civilized Tribes arose in the 1890's with the movement to create the state of Oklahoma out of Indian Territory.⁸

The lands of the Five Civilized Tribes in Indian Territory were held as tribal domains, and, pursuant to treaties, tribal consent was necessary to include the lands within the territorial limits of a state. In 1893, the Dawes Commission was created to negotiate agreements with the tribes regarding their rights under the treaties and to dissolve the tribal domains by allocating the tribal lands in severalty to tribal members.⁹ In order to determine who was entitled to share in the tribal domains, the Dawes Commission compiled tribal rolls.¹⁰ The Indians were classified according to amount of Indian blood and age and a roll book was published in 1906.¹¹

For the Five Civilized Tribes, the overall scheme of allotment of lands was to give each Indian an equal share of the tribal lands or monetary compensation.¹² The allotments were accompanied by restrictions as to alienability which evolved over a period of time as numerous acts were adopted which amended the restrictions. The justification for the restricted Indian ownership of land was to allow

7. Katherine R. Kile, *Acts of Congress Dealing with the Five Civilized Tribes*, in OKLAHOMA INDIAN LAND TITLES II-1, II-1 (Fall 1982) (Oklahoma Bar Association/Continuing Legal Education seminar material) (on file with author).

8. Benjamin T. Willey, *Indian Land Titles: An Introduction and Overview*, in OKLAHOMA INDIAN LAND TITLES I-1, I-4 (Fall 1982).

9. W. F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED § 15, at 18 (1952).

10. *Id.* § 15 at 19, § 82 at 70.

11. Kile, *supra* note 7, at II-2.

12. The allottees included 3,119 Seminoles with average allotments of 120 acres, 40 acres of which were classified as homestead; 18,712 Creeks, including 6,807 freedmen, with allotments of 160 acres, 40 acres of which were classified as homestead; 40,196 Cherokees, including 4,924 freedmen, with average allotments of 110 acres, 40 acres of which were classified as homestead; 27,021 Choctaws and Chickasaws with average allotments of 320 acres, 160 acres of which were classified as homestead; and 10,657 Choctaw and Chickasaw freedman to whom an average of 40 acres was allotted. SEMPLE, *supra* note 9, §§ 33 and 34, at 29-30.

the Indians time to adapt to a different culture and to prepare for competent business dealings.¹³

An Oklahoma title attorney or land person needs familiarity with a minimum of thirteen Acts of Congress in connection with determining ownership of lands descending from an allotment of a member of the Five Civilized Tribes. In addition, there are numerous treaties between the tribes and the United States which are important.¹⁴ The applicable Acts of Congress are printed in the public laws and are also published in W. F. Semple's treatise, *Oklahoma Indian Land Titles*.¹⁵ Appendix B includes a brief synopsis of the principal Acts of Congress dealing with restrictions on alienation by allottees of the Five Civilized Tribes.

The most important rule in dealing with Indian titles is that a purported conveyance in violation of alienation of restrictions is void.¹⁶ Therefore, it is important to understand the scheme of the alienation restrictions. The initial step is to determine whether the inception of the Indian title is from an individual allotment or from unallotted Indian lands.

In addition to the lands allotted to individual tribal members, the treaties with the tribes reserved lands from allotment. Lands used for cemeteries, churches and schools were not allotted but were reserved as common properties. Lots in existing towns were sold at auction and patents from the applicable tribe issued to purchasers. Other unallotted lands were sold at public auction under rules promulgated by the Secretary of the Interior, and purchasers took fee simple title under Unallotted Land Deeds which were approved by the Secretary of Interior and signed by the appropriate tribal authority.¹⁷

Title derived through individual allotments is much more complicated than that of the unallotted lands. The important considerations of the restriction scheme for allotted lands are:

A. Classification of the Indian by degree of Indian blood: Is the Indian a full-blood, half-blood, quarter-blood, intermarried white or freedman, i.e., a person who had formerly been a slave of a tribal member? The restriction scheme is more protective of tribal members with more Indian blood. When reviewing an Indian allotment, the patent will show the name of the tribe and the roll number of the

13. Cleverdon, *supra* note 3, at 6.

14. Kile, *supra* note 7, at II-1.

15. *Id.* at II-2.

16. Mosburg, *supra* note 2, at 183.

17. Willey, *supra* note 8, at I-6; SEMPLE, *supra* note 9, §§ 146-151, at 126-128.

allottee. The degree of blood of the allottee is determined by reference to the Dawes Commission roll. The rolls are available in the county law libraries or at the Bureau of Indian Affairs Office in Muskogee.¹⁸

B. Classification of the Land as Homestead/Surplus: Each member of the tribe, except for the Choctaw and Chickasaw freedmen, received two allotments — a homestead allotment and a surplus allotment.¹⁹ The homestead allotment is protected from alienation to a higher degree than the surplus allotment. The actual designation is shown on the patent. Choctaw and Chickasaw freedmen were allotted only surplus lands.

C. Age of the Allottee: Some restrictions are based on the age of the allottee. Certain acts prohibit a conveyance by a minor of allotted lands. If a conveyance is by a guardian appointed for a minor allottee, the title examiner reviews the authority and procedure of the guardian's appointment.

D. Entity with Approval Authority: Does an Act of Congress delegate approval of the conveyance to the Oklahoma courts or to the Secretary of Interior? Was the proper approval obtained?

E. Whether Indian is Original Allottee or an Heir of the Allottee: The restriction scheme is different for an original allottee than for an heir of an allottee.

F. Date of Conveyance: The date of the attempted conveyance is important to establish the scheme of restrictions imposed by the applicable act.

G. Whether Lands Were Subject to Taxation: If title descends from a tax deed, the title examiner must determine that the lands were legally subject to taxation. Tax sales and deeds of lands restricted from taxation are void and title remains in the allottee.²⁰

Characteristically, the initial Indian instrument encountered by a title examiner is a sheet of Dawes Commission roll information for the allottee followed by an Allotment Patent designated either "Homestead" or "Surplus." Subsequently, a deed or, more typically, several deeds out of the allottee are recorded and perhaps a quiet title action. Examination of these instruments in the context of the restrictions regarding alienation of allotted lands have created reoccurring legal issues for Oklahoma's title lawyers and oil and gas company land

18. Kile, *supra* note 7, at II-2.

19. *Id.*

20. Willey, *supra* note 8, I-11.

personnel. If faced with an Indian conveyance, whether such instrument is a deed or oil and gas lease, it is necessary to determine that the allotment restrictions are satisfied.

Restrictions affecting current conveyances, including oil and gas leases, apply to Indians of one-half or more blood. Restricted Indians of half-blood or more may convey their property if the Secretary of Interior or the district court removes restrictions. If the lands remain restricted, the restrictions are removed upon the allottee's death pursuant to the Act of August 4, 1947,²¹ except as to conveyances by an allottee's heirs or devisees of one-half or more Indian blood when the land was restricted in the hand of the person from whom the heir or devisee acquired title. In such situations, a conveyance requires removal of restrictions or approval of the district court after completion of the following procedures:

1. File petition for approval in the district court where the land is located and set hearing not less than ten days from the date of filing.
2. The judge shall sign a notice which describes the land and recites the consideration and which shall be published one time in a newspaper of general circulation in the county and notice shall be given to the Area Director's office at least ten days prior to the hearing.
3. The grantor is to appear at the hearing unless he and the Probate Attorney consent otherwise.
4. The court must be satisfied that consideration is paid and that the conveyance is in the best interest of the Indian.
5. Evidence at the hearing must be transcribed and filed of record in the case.
6. The purchaser must pay all costs of the case.
7. Competitive bids may be taken at the hearing and the sale confirmed to the highest bidder.

Upon completion of the court approval proceeding, the Indian is free to execute a commercial oil and gas lease or deed.²²

Lands still owned by original Indian allottees whose restrictions have not been removed and tribal lands are leased under departmental forms of oil and gas leases. Forms for these leases and assignments are available from the Bureau of Indian Affairs at Muskogee.²³ A departmental lease cannot be assigned unless the Bureau of Indian

21. 61 Stat. 731 (current version at 25 U.S.C. § 355 (1983)).

22. Act of August 4, 1947, 61 Stat. 731 (current version at 25 U.S.C. § 355 (1983)).

23. Kile, *supra* note 7, at II-19.

Affairs approves the assignment. The provisions of these departmental leases continue until the Bureau of Indian Affairs relinquishes supervision and even after the death of the lessor/allottee.²⁴ The Bureau of Indian Affairs in Muskogee will furnish a copy of departmental oil and gas leases and their status.

Probably the most common title opinion requirement in the area of Indian titles is for a judicial determination of heirship of a deceased allottee. Although an order approving a deed usually sets out information of heirship, the order is not a judicial finding as to heirship because the judge is merely acting in an administrative capacity as delegated by the federal government. To determine heirship of a deceased allottee, it is necessary to use one of the following methods:

1. Section 1 of the Act of June 14, 1918,²⁵ which is essentially an administrative procedure and not a judicial procedure;
2. Decree of final distribution of an estate by a probate court (district court); or
3. Quiet title or partition action in district court.²⁶ Land personnel may decide to waive requirements for determination of heirship based upon business judgment, especially in reliance upon an Affidavit of Heirship or a Proof of Death and Heirship from the files of the Bureau of Indian Affairs in Muskogee.

To avoid expensive curative, if faced with a title requirement regarding Indian restrictions, always check with the Bureau of Affairs Office to determine if Indian restrictions were removed from the subject land. The removal of restrictions may not be apparent to the examining attorney. In addition, do not assume that Oklahoma's Marketable Record Title Act,²⁷ will cure the requirement. The Marketable Record Title Act is generally considered not to apply to Indians of the Five Civilized Tribes.²⁸

III. INDIAN TITLES DERIVED THROUGH THE OSAGE NATION

The Osage Indians were moved from Kansas and located within the boundaries of present day Osage County by the Act of Congress

24. *Id.*

25. 40 Stat. 606 (current version at 25 U.S.C. § 355 (1983)).

26. SEMPLE, *supra* note 9, § 243, at 196.

27. OKLA. STAT. tit. 16, § 71 (1981),

28. Kile, *supra* note 7, at II-18; Cleverdon, *supra* note 3, at 14.

of June 5, 1872.²⁹ The Act of Congress of June 28, 1906,³⁰ gave the Indians the right to own the land individually. Pursuant to that act, the surface of the lands was allotted to individual tribal members, and the oil, gas, coal and other minerals were reserved to the tribe.³¹

Oil and gas leases are negotiated with the Bureau of Indian Affairs at Pawhuska and are either oil leases or gas leases or a combination oil and gas lease. An examination of the records of Osage County is not necessary because all records are located at the Bureau of Indian Affairs.³² All royalties are paid to the Bureau of Indian Affairs and then transferred to the Osage Tribe. Royalties are calculated at the highest posted price by the major purchasers in Osage County, and the Bureau of Indian Affairs notifies lessees of the amount to remit. The income from this source is distributed to tribal members according to their "headrights" which is their pro rata share of the income.³³ Upon the death of the original allottee, the headright is divided among the heirs.³⁴

The surface of the Osage Nation was allotted to individual tribal members pursuant to the Act of Congress of June 28, 1906.³⁵ The homestead was inalienable and non-taxable.³⁶ The surplus was inalienable for twenty-five years and non-taxable for three years or until a certificate of competency was issued.³⁷ Inherited lands were alienable until passage of the Act of February 27, 1925,³⁸ which made lands inherited by tribal members of one-half blood or more inalienable. The Act of March 3, 1921,³⁹ removed restrictions as to adults of less than one-half blood.⁴⁰

Restricted Osage Indians may execute wills if the wills are approved by the Secretary of the Interior. Oklahoma district courts have jurisdiction over estates of members of the Osage Nation.

29. 17 Stat. 228 (current version at Rev. Stat. § 3892) (1872). See also *SEMPLE*, *supra* note 9, § 638, at 464.

30. 34 Stat. 539 (current version at 25 U.S.C. § 345 (1983)). See also *SEMPLE*, *supra* note 9, § 638, at 465.

31. *SEMPLE*, *supra* note 9, § 639, at 465.

32. Kile, *supra* note 7, at II-20.

33. *SEMPLE*, *supra* note 9, § 644, at 467.

34. *Id.*

35. 340 Stat. 540 (current version at 25 U.S.C. § 345 (1983)). See also *SEMPLE*, *supra* note 9, § 639, at 465.

36. *SEMPLE*, *supra* note 9, § 641, at 466.

37. *Id.* § 642, at 466.

38. 43 Stat. 1008 (1925).

39. 41 Stat. 1225 (1921).

40. Cleverdon, *supra* note 3, at 5.

IV. INDIAN TITLES DERIVED THROUGH THE GENERAL ALLOTMENT ACT

Unlike the restricted fee ownership allotment scheme of the Five Civilized Tribes, Indian allotments under the General Allotment Act⁴¹ (also referred to as the Dawes Act), were made on the basis of trust-type ownership.⁴² Broadly speaking, the allottee has an equitable and present usable estate in land, but the legal title remains in the federal government and does not pass to the allottee or his heirs until the issuance of a fee patent.⁴³ Tribes covered by the General Allotment Act include the Kiowa, Comanche, Apache (Kiowa-Apache), Wichita, Caddo, Delaware of Western Oklahoma, Fort Sill Apache, Cheyenne-Arapaho, Kaw, Pawnee, Ponca, Tonkawa, Otoe-Missouria, Eastern Shawnee, Miami, Seneca-Cayuga, Peoria, Wyandotte, Quapaw, Ottawa, Modoc, Absentee Shawnee, Citizen Band Potawatomie, Iowa, Kickapoo, and Sac and Fox.⁴⁴

Working with lands allotted under the General Allotment Act requires examination of the records of the appropriate office of the Bureau of Indian Affairs.⁴⁵ State recording statutes and curative acts have a limited effect on the rights of parties who could claim an interest in these lands. Unless restrictions are removed or federal law or regulation specifically refers to state law, federal law will control all aspects of ownership of these lands.⁴⁶ Any contracts or conveyances made without the authority of federal law are void.⁴⁷

The general concept of the General Allotment Act was to divide tribal lands among eligible members of the tribes and to sell the excess lands. Trust patents were issued to individual allottees evidencing the right to use and occupy of the premises with final title to be issued at the end of the trust period.⁴⁸ The early trust patents set out an initial

41. Act of Congress, Feb. 8, 1887, 24 Stat. 388 (current version at 25 U.S.C. § § 331-335 (1983)).

42. Willey, *supra* note 8, at I-7.

43. SEMPLE, *supra* note 9, § 723, at 513 & n.2.

44. See SEMPLE, *supra* note 9, for individual Acts. See also *id.* § 730, at 517, 520; Rex E. Herren, *The General Allotment Act: Land Sales, Probate, Communitization Agreement*, in OKLAHOMA INDIAN LAND TITLES, III-1, III-2, III-4 - III-7 (Fall 1982); Jap W. Blankenship, *Practical Aspects of Obtaining Approval of Transactions Affecting Indian Lands*, in OKLAHOMA INDIAN LAND TITLES, IV-1, IV-1 (Fall 1982).

45. Willey, *supra* note 8, at I-7.

46. SEMPLE, *supra* note 9, § 726, at 514.

47. *Id.* §§ 725 & 726, at 514.

48. Herren, *supra* note 44, at III-2.

trust period of 25 years,⁴⁹ which has been extended pursuant to various executive orders up to the present time with the most recent extension until January 1, 1994.⁵⁰ Removal of restrictions and governmental trust supervision can be terminated in a variety of ways including competency determinations,⁵¹ fee patents,⁵² sales to non-trust status⁵³, the death of allottee and the inheritance by non-Indians,⁵⁴ mortgages,⁵⁵ special Acts of Congress,⁵⁶ condemnations,⁵⁷ leasing,⁵⁸ and easements.⁵⁹

The Secretary of the Interior has broad powers in determining the effectiveness of wills and the heirship of a deceased allottee.⁶⁰ Oklahoma state laws of descent and distribution are applied unless specifically otherwise provided by the Acts of Congress.⁶¹ Until such time that the land is no longer restricted, state courts have no jurisdiction. If the heirs of a deceased allottee were not determined during the trust period, and a trust patent has been withdrawn, a fee patent issued and the supervision of the government removed, the state district courts have jurisdiction to determine the heirs of the allottee.

Prior to June 25, 1910,⁶² there were no statutes which allowed determination of heirship. Pursuant to the Act of May 27, 1902, the Secretary of the Interior could approve conveyances of adults and minors of inherited land and the approval of the deed constituted a practical determination of the heirs. The Act of June 25, 1910, allowed the determination of heirship by the Secretary of the Interior. This grant

49. 2 LAW OF FED. OIL AND GAS LEASES (Matthew Bender) § 26.01[3], at 26-7 (August, 1993). See also W. R. Withington, *Land Titles in Oklahoma Under the General Allotment Act*, in CASES AND MATERIALS ON PROBLEMS IN LANDS ALLOTTED TO AMERICAN INDIANS 365, 365 (1980, 1982) (Continuing Legal Education seminar material) (on file with author).

50. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.01[3], at 26-8.

51. SEMPLE, *supra* note 9, § 823, at 557, § 830, at 560.

52. *Id.* § 822, at 557; Herren, *supra* note 44, at III-37, III-38.

53. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.01[3], at 26-10.

54. *Id.*; Herren, *supra* note 44, at III-45.

55. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.01.

56. Withington, *supra* note 49, at 366.

57. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.01.

58. *Id.*

59. Withington, *supra* note 49, at 371. For notes 47 through 55, see generally LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.01, at 26-10.

60. Herren, *supra* note 44, at III-51. See also Appendix B pertaining to Acts of Congress.

61. SEMPLE, *supra* note 9, § 844, at 572, n. 2 at 572. See also Withington, *supra* note 49, at 367.

62. 25 U.S.C. §§ 372, 373 (1988); Herren, *supra* note 44, at III-3; SEMPLE, *supra* note 9, § 855, at 577.

of authority to the Secretary of the Interior is final in the absence of fraud, error of law or gross mistake.⁶³

A record is kept in the Office of the Commissioner of Indian Affairs, Washington, D.C., of all determinations of heirship by the Department of the Interior. The local field office of the tribe to which the allottee belonged has information as to what determination was made by the Indian office. Often the information, including affidavits and other information, is conflicting, and the Secretary of the Interior has the discretion to reopen a finding of heirship.

Statutes and regulations control the leasing of allotted lands for oil and gas. The Act of March 3, 1909,⁶⁴ states as follows:

All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: Provided, that if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.⁶⁵

In other words, the allottee may negotiate a lease if deemed advisable by the Secretary of the Interior or the Superintendent of the Bureau of Indian Affairs Agency as the Secretary's authorized representative, subject to certain rules and regulations. If the allottee is deceased, however, and the heirs are not determined or if some or all of the heirs are not located, then the Secretary may not negotiate a lease but must offer the lease for bid.⁶⁶ The Act of August 9, 1955, modified the Act of March 3, 1909, to provide for leasing by the Secretary if the

63. *SEMPLE*, *supra* note 9, § 855, at 577. *See also* *Drummond v. United States*, 131 F.2d 568 (10th Cir. 1942); *Hanson v. Hoffman*, 113 F.2d 780 (10th Cir. 1940).

64. 25 U.S.C. § 396 (1982).

65. 25 U.S.C. § 396 (1983). *See also* *SEMPLE*, *supra* note 9, § 812, at 553.

66. *Blankenship*, *supra* note 44, at IV-9, IV-10.

allottee is deceased and the heirs have not been determined, or if determined, cannot be located. In order to lease, however, the Secretary must first give notice and advertise, and the lease is granted by competitive bidding.⁶⁷ The regulations adopted under the Act of 1909 expand this requirement to apply to all leases of allotted lands, not only those of heirs or unlocatables.

The 1938 Omnibus Leasing Act⁶⁸ is the basic authority for leasing tribal lands. Additionally, rules and regulations govern the leasing of tribal lands for oil and gas purposes.⁶⁹ Though the rules and regulations governing the leasing of tribal lands are substantially the same as those governing allotted lands, the few that differ can cause great problems.⁷⁰ The major differences which cause concern are as follows:

1. Always determine the tribal officials who are authorized to act on behalf of the tribe with respect to the transaction. These differ between tribes.⁷¹

2. Although the Secretary of Interior (or his authorized representative) may reject a lease, he cannot grant a lease on tribal lands of his own authority. The lease must be approved by the authorized tribal body.⁷²

3. All leases must first be offered for competitive bid by advertisement in accordance with the regulations. Subject to this regulation, section 171.3 provides that leases may then be made through private negotiations. Provide your title attorney with evidence that the lease had first been advertised, such as the certified transcript of the prior advertised sale proceedings obtained from the Bureau of Indian Affairs agency having jurisdiction over the land.⁷³

Pursuant to Section 4 of the Omnibus Leasing Act,⁷⁴ all operations on oil and gas leases on Indian lands must comply with rules and regulations promulgated by the Secretary of the Interior,⁷⁵ as administered under the direction of the Bureau of Land Management.⁷⁶ If

67. *Id.* at IV-9.

68. 25 U.S.C. §§ 396a - 396g (1983).

69. 25 C.F.R. §§ 171.1 - 171.30 (1993).

70. SEMPLE, *supra* note 9, § 812, at 553.

71. 25 U.S.C. §§ 2101-2108 (1988). *See also* Blankenship, *supra* note 44, at IV-20, IV-21.

72. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.05, at 26-18. *See also* Blankenship, *supra* note 44, at IV-22.

73. 25 U.S.C. § 396(b) (1983); 25 C.F.R. §§ 211.3 (1993).

74. 25 U.S.C. § 396(b) (1983).

75. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.10, at 26-38.

76. 43 C.F.R. §§ 3100 - 3190 (1992).

the lease or agreement refers to any other government agencies or offices, these references are now all interpreted to refer to the Bureau of Land Management or Mineral Management Service.⁷⁷

In 1982, through The Federal Oil and Gas Royalty Management Act,⁷⁸ Congress greatly increased the Department of Interior's powers in regards to accounting for and regulating production of oil and gas.⁷⁹ The Secretary of the Interior or one of his agents must initially approve the tribal lease, and he must approve any operations on tribal leases before they are undertaken.⁸⁰ Furthermore, once the lease is approved, the Bureau of Land Management must give written permission to the lessee before he can commence operations, and the lessee must thereafter comply with all Bureau of Land Management regulations.⁸¹ If the lease covers allotted lands and not tribal lands, the regulations are very similar.⁸²

All documents which transfer an interest in or modify the terms of a tribal or allotted oil and gas lease must be approved by the Secretary of the Interior on his forms.⁸³ Assignments of overriding royalties need not be filed for approval or even made apparent to the Superintendent. Under the Omnibus Leasing Act of 1938, the only interests of a tribal or allotted oil and gas lease which may be assigned are the entire interest or a partial, undivided interest.⁸⁴ There has always been some question whether a lessee may assign a divided interest in a tribal lease because in some instances they have been approved and in other instances they have been rejected.⁸⁵ Recent forms usually provide that if a lease is divided by the assignment of an entire interest in any part, each part shall be considered a separate lease.⁸⁶ All assignments and conveyances of leasehold interests (other

77. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.10, at 26-38.

78. Pub. L. No. 97-451, 96 Stat. 2447 (codified as amended at 30 U.S.C. § 1701 (1983)).

79. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.10, at 26-39. *See also* 43 C.F.R. § 3160 (1992); 30 C.F.R. §§ 228 and 229 (1989).

80. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, at 26-39 - 26-40.

81. *Id.* at 26-40.

82. *Id.* The Department of Interior has long held that failure to put leased premises under production in paying quantities during the primary term results in the termination of the lease by its own terms. But see, *Moncrief v. Pazotex Petroleum Co.*, 280 F.2d 235 (10th Cir. 1960), which held, based on Oklahoma law, that a well commenced during a primary term of an allotted lease with a standard habendum clause would extend the lease for a period sufficient to complete the well. Suffice it to say that no extension of the primary term of tribal leases beyond the 10 year statutory limit would be advisable.

83. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.11, at 26-46, nn.1-2 (citing 25 C.F.R. §§ 211.26, 211.30, 212.22, 212.32 (1993)).

84. *Id.* § 26.11, at 26-45.

85. *Id.*

86. 25 C.F.R. §§ 226.15(b), 227.26(a) (1993).

than overrides) "shall be filed with the Superintendent within 30 days of execution."⁸⁷ If a document is filed after this time but nonetheless is approved, this is not deemed a title defect.⁸⁸ In many instances, where a prior assignment has not been approved, companies will use an assignment of operating rights as a document of transfer of an interest in the oil and gas lease.⁸⁹ Under the regulations, "assignments of operating rights must be approved in order to be effective."⁹⁰ However, it is possible that an assignment of operating rights may be enforced between the parties regardless of whether approval had been granted.⁹¹ Consequently, because many companies do not seek approval of the assignment of operating rights, it is very important to review company files as well as Bureau of Indian Affairs and county records in determining title.

RECENT CASES UNDER THE GENERAL ALLOTMENT ACT

1. *Estoril Producing Corp. v. Murdock*, 822 P.2d 129 (Okla. Ct. App. 1991).

Kah-Kah-to-the-Quah was a restricted Mexican Kickapoo Indian who received an allotment of 80 acres which was held in trust by the United States. On October 20, 1927, Mr. -Quah executed a Warranty Deed to the C.R.I. & P. Railroad. By looking at the deed, there is no approval shown by the Secretary of the Interior as required by the General Allotment Act.

On October 5, 1980, the heirs of Kah-Kah-to-the-Quah executed an oil and gas lease to defendants. The defendants claim title through a 1986 oil and gas lease executed by the successors of the railroad.

The appeals court stated that the three basic requirements of the Act are:

1. The conveyance must be in such terms and conditions and under such rules and regulations as the Secretary may prescribe;
2. The conveyance must be under the supervision of the Commissioner of Indian Affairs; and
3. Approval of the conveyance must be made by the Secretary of the Interior. The warranty deed, on its face, fails to evidence that

87. LAW OF FED. OIL AND GAS LEASES, *supra* note 49, § 26.11, at 26-46, n.11 (citing 25 C.F.R. §§ 211.26(c), 212.22(c), 226.15(b) (1993)).

88. *Id.* § 26.11, at 26-46.

89. *Id.* § 26.11, at 26-47.

90. *Id.*

91. *Cleary v. Sewell*, 299 P.2d 524 (Okla. 1956); LAW OF FED. OIL AND GAS LEASES, *supra* note 49, at 26-47 & n.17.

these three requirements were met. Since there was no approval, the deed is void. Because the deed is void, the oil and gas lease from the successors of the railroad is also void.

2. *Cheyenne-Arapahoe Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992).

The Cheyenne-Arapahoe Tribes executed six oil and gas leases, four with Woods Petroleum in May of 1976, and two with Reading & Bates in February of 1980. All leases were for a term of five years plus term of production and all were approved by the Area Superintendent.

In April, 1981, Reading & Bates and Woods sought to communitize these leases. The Tribe refused to approve the communitization agreements on the four leases that were expiring in 1981, without renegotiation, which the lessees refused to do. The proposed communitization agreement was then submitted to the Area Director of the Anadarko Office of the Bureau of Indian Affairs and was approved. The Tribe appealed but the Area Director's decision was affirmed. The Tribe sued in federal court which ruled that the lack of tribal consent did not invalidate communitization agreements but held that the Area Director had breached his fiduciary responsibility by approving the agreements without studying the economic conditions prevailing at the time. Thus, the 1981 leases expired.

The Tenth Circuit agreed and concluded that the Secretary's position as a trustee over tribal lands conveys with it fiduciary responsibilities, and thus the Secretary must consider the economic interests of Indian lessors and has a duty to maximize lease revenues.

The record revealed that the Area Director did not consider any evidence of the market value and marketability of a new lease. (The value of leases in the Deep Anadarko Basin had risen astronomically in the 1980's.) The Tenth Circuit concluded that the Secretary and his delegates' actions were an "arbitrary and capricious abuse of discretion" and that the communitization agreements were not valid and that any leases upon which drilling had not commenced by May 10, 1981, had expired as of that date.

APPENDIX A

USEFUL RESEARCH MATERIALS

1. W.F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED (1952 & Supp. 1977). This book is out of print but is available at the Tulsa County Law Library and the University of Tulsa Law Library.
2. LAWRENCE MILLS, OKLAHOMA INDIAN LAND LAWS, Thomas Law Book Co. (1924 Law Co-op Supp. 1947). This book is out of print but is available at the Tulsa County Law Library and the University of Tulsa Law Library.
3. General Allotment Act, 25 U.S.C.A. §§ 331, *et seq.* (1983).
4. 25 C.F.R. and 43 C.F.R., generally.
5. FELIX COHEN, U. S. DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958). This is a general treatise with an update by Professor Rennard Strickland of the American Indian Law and Policy Center, University of Oklahoma. It is available through the governmental printing office. It is particularly good for tribal matters. This book is also available at the University of Tulsa Law Library.
6. Joseph F. Rarick, Oklahoma Indian Land Titles (1982) (unpublished manuscript, on file with the University of Oklahoma). This material can be ordered from the University of Oklahoma by writing: Continuing Legal Education, University of Oklahoma Law Center, 300 West Timberdell, Room 314, Norman, Oklahoma 73019, cost \$49.95.
7. JOSEPH F. RARICK, CASES AND MATERIALS ON PROBLEMS IN LANDS ALLOTTED TO AMERICAN INDIANS (1982). This material is available at the Tulsa County Library or can be ordered from the University of Oklahoma by writing: Continuing Legal Education, University of Oklahoma Law Center, 300 West Timberdell, Room 314, Norman, Oklahoma 73019, cost \$29.50.
8. ROLLS OF THE DAWES COMMISSION. This material is available at the Rudisill North Regional Branch of the Tulsa County Library and the University of Tulsa Law Library.

9. W. R. Withington, *Land Titles In Oklahoma Under The General Allotment Act*, CASES AND MATERIALS ON PROBLEMS IN LANDS ALLOTTED TO AMERICAN INDIANS, 365 (1980, 1982)(also cited in 30 O.B.J. 2320 (1960)).
10. W. R. Withington, *Kickapoo Titles In Oklahoma*, 23 O.B.J. 1751 (1952).
11. Alan J. Sullivan, *Minimizing The Double Tax Burden On Oil And Gas Production In Indian Country*, 36 ROCKY MTN. MIN. L. INST. 17 (1990).

APPENDIX B

SUMMARY OF PRIMARY ACTS OF CONGRESS DEALING WITH
RESTRICTIONS ON ALIENATION FOR THE FIVE CIVILIZED TRIBES

1. Act of April 21, 1904, 33 Stat. 189. This act removed restrictions upon the surplus lands of whites and freedmen of majority age and provided that the Secretary of the Interior could remove restrictions as to other surplus lands of majority age owners if the removal of the restriction was in the best interest of the allottee.
2. Act of April 28, 1904, 33 Stat. 573. This act applied Arkansas law to Indian Territory and gave the district courts jurisdiction over estates of decedents and guardianships of allottees.
3. Act of April 26, 1906, 34 Stat. 137 (current version at 25 U.S.C. § 355 (1983)). This act provided that all patents and conveyance instruments affecting allotted lands shall be recorded in the office of the Commissioner of the Five Civilized Tribes and when recorded shall convey legal title. The Act also provided that no full-blood shall sell or encumber his allotted lands for a period of twenty-five years unless the restrictions are removed. The act exempted allotted lands from taxes as long as title remained in the original allottee and remained restricted and contained a provision authorizing Indians of the Five Civilized Tribes to make wills.
4. Act of May 27, 1908, 35 Stat. 312 (current version at 25 § 355 (1983)). This act sets out the basic alienation scheme for allotted lands. The act freed all lands of intermarried whites, freedmen and mixed bloods of less than half blood, including minors, from all restrictions. The surplus lands of mix-bloods of half blood or more and less than three-quarter blood were freed from restrictions and the homestead lands could be sold or encumbered if the Secretary of Interior removed restrictions. Lands of an allottee having more than three-quarters Indian blood were left fully restricted. An additional provision was that the death of an allottee removed all restrictions upon alienation except, as to full-blood heirs, the court having jurisdiction of the settlement of the estate of the deceased allottee must approve a conveyance by the heir.
5. Act of June 14, 1918, 40 Stat. 606 (current version at 25 U.S.C. § 375 (1983)). This act allowed the probate courts of the State of

Oklahoma to determine the heirship of any deceased allottee of the Five Civilized Tribes who died leaving restricted heirs. The act also provided that the lands of full-bloods were made subject to Oklahoma partition laws.

6. Act of August 24, 1922, 42 Stat. 831. This act validated approval of deeds by the Secretary of the Interior and any prior order issued removing restrictions except those procured through fraud or duress.

7. Act of April 12, 1926, 44 Stat. 239 (current version at 25 U.S.C. § 355 (1983)). This act, often called the "Hastings Act," provided that if a member of the Five Civilized Tribes of one-half or more Indian blood should die leaving children surviving born since March 4, 1906, the homestead of such deceased allottee remained inalienable unless restrictions were removed by the Secretary of the Interior. The provision was adopted to support the so-called "afterborn" children. Section 3 of the act confers jurisdiction upon the courts of Oklahoma to try title to land in which the allottees of the Five Civilized Tribes or their heirs claim an interest as long as written notice of suit is served upon the Superintendent for the Five Civilized Tribes (now Area Director) who has twenty days to remove the case to the federal courts. The act also provided that Oklahoma statutes of limitation apply against all restricted Indians of the Five Civilized Tribes.

8. Act of May 10, 1928, 45 Stat. 495. This act extended the restrictions against alienation for twenty-five years from April 26, 1931, and gave the Secretary of the Interior authority to remove the restrictions upon the application of the restricted Indian. The provisions protecting afterborns were deleted. The act applied Oklahoma's gross production taxes to all minerals produced from restricted allotted lands. The act also limited the tax exemption of each restricted Indian to 160 acres.

9. Act of January 27, 1933, 47 Stat. 777 (current version at 25 U.S.C. § 355 (1983)). This act restricted tax exempt lands inherited after January 27, 1933, by heirs and/or devisees of the half-blood Indian. The act provided that approval of conveyances must be made in open court after notice in accord with the rules of procedure for probate matters adopted by the Supreme Court of Oklahoma in June, 1914.

10. Act of June 26, 1936, 49 Stat. 1967 (current version at 25 U.S.C. § 501 (1983)). This act, known as the Oklahoma Welfare Act, provided that if restricted Indian land was sold, the Secretary of the Interior had a preferential right to purchase the land for any other Indian.

11. Act of July 2, 1945, 59 Stat. 313 (current version at 25 U.S.C. § 355 (1983)). This was a curative act which validated certain conveyances of lands that had been purchased for an Indian and which validated judgments in partition cases from June 14, 1918, to the date of the act where the United States was not made a party. The act also provided that all lands purchased by the Secretary for an Indian would be restricted. (Deeds to these purchased lands contain elaborate statements setting forth the requirements for sale and are called "Carney Lacher" deeds.)

12. Act of August 4, 1947, 61 Stat. 731 (current version at 25 U.S.C. § 355 (1983)). This act provided that the death of a restricted allottee removed all restrictions from his lands except if the restricted land passed to an Indian heir or devisee of one-half or more Indian blood, a conveyance, including an oil and gas or mineral lease, required court approval. Notice must be given to the Area Director of all conveyances so that he may purchase the land under the Oklahoma Welfare Act. The act also subjected all restricted lands of the Five Civilized Tribes to the oil and gas conservation laws of Oklahoma including orders of the Oklahoma Corporation Commission if approved by the Secretary of the Interior.

13. Act of August 11, 1955, 69 Stat. 666 (current version at 25 U.S.C. § 355 (1983)). This act extended the period of restriction on lands belonging to Indians of the Five Civilized Tribes and set out methods for removing restrictions which are not covered by the Act of 1947.

SUMMARY OF PRIMARY ACTS OF CONGRESS RELATING TO THE OSAGE NATION

1. Act of June 28, 1906, for Division of Lands and Funds of Osage Indians and for Other Purposes, 34 Stat. 540 (current version at 25 U.S.C. § 345 (1983)). This act is the basic one for the allotment of the surface to the members of the Osage Tribe and the reservation of the coal, oil, gas and other minerals to the tribe.

2. Act of March 3, 1921, 41 Stat. 1249. This act reserved coal, oil, gas and other minerals to the tribe for 25 additional years.
3. Act of February 27, 1925, 43 Stat. 1008. This Act stated that Osage Indians of one-half blood or more were restricted and that only heirs of Indian blood could inherit from those who were one-half or more Indian blood. This Act did not apply to spouses who were under existing marriages as of the date of enactment.
4. Act of March 2, 1929, 45 Stat. 1478. This Act applied restrictions to children born after July 1, 1907.
5. Act of July 25, 1947, 61 Stat. 459 (current version at 15 U.S.C. § 717f (1976 & Supp. 1993)). This Act granted the authority to determine the bonus value of any tract offered for lease to the Osage tribal council.
6. Act of February 5, 1948, 62 Stat. 18 (current version at 25 U.S.C. §§ 323 - 328, 331 (1983)). This Act declared that the Secretary of the Interior was to issue certificates of competency to all Osage Indians of less than one-half blood and who are 21 years of age or older.

SUMMARY OF PRIMARY ACTS OF CONGRESS RELATING TO INDIAN
ALLOTMENTS UNDER THE GENERAL ALLOTMENT ACT

1. General Allotment Act of February 8, 1887, 24 Stat. 388 (current version at 25 U.S.C. §§ 331, 332 (1983)). This Act provided for the issuance of trust patents to individual Indian allottees which evidenced their right to the use and occupancy of a certain tract of land with a fee patent to be issued at the end of the trust period. The initial trust period was 25 years. Any conveyance of these lands without approval was declared absolutely null and void.
2. Numerous allotment agreements between the United States and individual tribes from March 3, 1891, to March 2, 1895. (*See* SEMPLE, OKLAHOMA INDIAN LAND TITLES, Appendix Part III, pp. 862-915.)
3. Act of May 27, 1902, 32 Stat. 275 (current version at 25 U.S.C. § 379 (1983)). This Act sets out the basic alienation scheme for allotted lands. Adult heirs of deceased Indians who held restricted lands at the time of their death may sell or convey the inherited lands. If the heir was a minor, the interest could be sold only by a guardian duly appointed by the proper court and the sale had to be approved

by the Secretary of the Interior. Such sold lands were then subject to taxation.

4. Act of June 21, 1906, 34 Stat. 327 (current version at 25 U.S.C. §§ 354, 409-11 (1983)). This Act exempted allotted lands from satisfaction of any debt prior to issuance of the final patent in fee.

5. Act of March 1, 1907, 34 Stat. 1018 (current version at 25 U.S.C. § 405 (1983)). This Act pertained to the sale of allotments of noncompetent Indians.

6. Act of June 25, 1910, 36 Stat. 855 (current version at 25 U.S.C. §§ 151, 372 (1983)). This Act provided that the Secretary of the Interior had the exclusive jurisdiction for determining the heirs of an Indian with land whose trust period had not expired and who did not have a fee simple patent on the property. The Secretary was authorized to issue certificates of competency upon application to any Indian or his heirs at his discretion and such certificates would have the effect of removing the restrictions. (*See* Act of April 30, 1934.)

7. Act of February 14, 1913, 37 Stat. 678 (current version at 25 U.S.C. § 373 (1983)). This Act granted Indians over age 21 with allotments held in trust the right to dispose of their property by will. The will had to have been approved by the Secretary of the Interior. Approval could be granted even after the death of the testator.

8. Act of May 18, 1916, 39 Stat. 127 (current version at 25 U.S.C. § 378 (1983)). This Act granted the Secretary of the Interior the ability to partition allotments or inherited trust allotments.

9. Act of June 30, 1919, 41 Stat. 9 (current version at 25 U.S.C. § 163 (1983)). This Act granted the Secretary of the Interior the authority to cause a final roll to be made of the membership of any Indian tribe.

10. Act of September 21, 1922, 42 Stat. 995 (current version at 25 U.S.C. §§ 280, 392 (1983)). This Act enabled the Secretary of the Interior to consent to or approve of the alienation of any allotments in his discretion by deed, will, lease, or any other form of conveyance, but such approval did not operate to remove the restrictions against alienation unless such an order of approval was specifically directed.

11. Act of March 3, 1928, 45 Stat. 161 (current version at 25 U.S.C. §§ 151, 372 (1983)). This Act amended Section 1 of the Act of June 25, 1910, to provide for the determining of the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, and for the leasing of allotments and other purposes.
12. Act of April 30, 1934, 48 Stat. 647 (current version at 12 U.S.C. § 1465, 1468 (1989 & Supp. 1993); 25 U.S.C. § 372 (1983)). This Act once again amended Section 1 of the Act of June 25, 1910, to provide for the determining of the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, and for the leasing of allotments and other purposes.
13. Act of July 8, 1940, 54 Stat. 745 (current version at 25 U.S.C. § 380 (1983)). This Act allowed the leasing of inherited lands but it did not pertain to oil and gas mining purposes.

