CHAPTER 15

TRIBAL PROPERTY

SCOPE

This chapter describes the forms of tribal title in real and personal property; the territorial scope of tribal lands, including boundaries and rights in lands under waterways; rules concerning alienation of tribal property; extinguishment of tribal title; and takings of tribal property. Individual property interests held by tribal members in real and personal property, including assignments of tribal land and restricted trust allotments, are covered in Ch. 16, Individual Indian Property. Rules regarding management of trust property, breach of trust claims, and remedies are covered in Ch. 5, Tribal/Federal Relationship. Tribal rights in intellectual property, sacred sites, and cultural resources are covered in Ch. 20, Tribal Cultural Resources. Other related chapters involving property rights and land claims include Ch. 17, Natural Resources; Ch. 18, Hunting, Fishing, and Gathering Rights; and Ch. 19, Water Rights.

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SCOPE
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§ 16.01. Individual Interests in Tribal Property

[1] Introduction

Individual rights in tribal property depend on the nature of tribal interests in property. A tribal member’s interest in tribal property is inchoate, unless federal or tribal law recognizes a more definite right. An individual has no vested right in tribal land or other property, unless some designated interest has been set aside for the individual.


The United States and its predecessor governments consistently defined tribal title as the communal property of tribes. Treaties often provided that land be held in common, and judicial opinions sometimes refer to tribal land as held “in common.” These references do not mean the tenancy in common of the common law, however. By contrast to tenants in common, tribal members have no ownership interest in tribal land that entitles them to federal rights of partition, conveyance, or succession at death.

The interests of tribal members in tribal property derive from their membership. Under federal law, a tribal member’s derivative interest in tribal property arises at birth or enrollment and ends at death or disenrollment. A member cannot convey title to tribal land and has no federal-law right against the tribe to any particular part of tribal property, absent a specific law or treaty granting rights in severalty to members.

[3] Rights to Occupy and Use under Tribal Law

Although ownership of tribal property is vested in the tribe rather than individual members, allocation of occupancy among tribal members is common. Tribes may grant their members, as a matter of tribal law, rights to occupy and use tribal land for home and business sites, grazing, farming, fishing, hunting, gathering, timber cutting, and other uses. Reported tribal court decisions address issues such as rights to homesites and evictions, and rights in farmland. Rights of use granted by tribes may be transferred, conveyed, or inherited as tribal law allows. In approving leases or other conveyances of tribal land subject to individual use rights, however, the Department of the Interior’s responsibility is to the tribal...
CHAPTER 19

WATER RIGHTS

SCOPE

This chapter discusses tribal and individual rights to water, including regulatory and adjudicative jurisdiction over water rights.

For a discussion of water quality regulation, see Ch. 10, Environmental Regulation in Indian Country. For a discussion of the federal trust obligation in the context of real property, see Ch. 5, §§ 5.03–5.05. For a discussion of the leasing of Indian land, see Ch. 17, Natural Resources. For a discussion of fishing rights, see Ch. 18, Hunting, Fishing, and Gathering Rights.

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§ 19.01. Relation between Indian and State Water-Law Systems

[1] State Water-Law Systems

Indian tribes have well-established rights to large, but often still unquantified, amounts of water. These rights are based primarily on the concept that the establishment of an Indian reservation recognized legal rights not only to the land, but also to sufficient water to fulfill the purposes of the reservation. Indian reserved water rights are property rights that are predicated on federal law, and are not dependent on state substantive law. Thus, reserved rights represent an exception to the general rule that allocation of water is the province of the states. Because of the inevitable interplay between reserved rights and state rights, however, Indian rights to water cannot be understood apart from state water-law regimes, in particular the prior appropriation system of the western states.

The prior appropriation system is recognized in one form or another in all of the mainland western states. Under several late nineteenth-century statutes, waters on the public domain were opened to appropriation under the laws of the various states and territories, although none of those acts affected the water rights of federal reservations.

Appropriative water rights attach to the use of an amount of water on a specific piece of land, which need not border on the body of water: