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Description of document: **United States Department of the Interior, Office of The Solicitor, Division of Indian Affairs opinion re: The Nature of Aboriginal Indian Title, 28-September-1976**

Posted date: 11-December-2008

Source of document: United States Department of the Interior  
Office of the Solicitor  
Division of Indian Affairs  
Washington D.C.

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

28 1976 SEP

Memorandum

To: Lawrence A. Aschenbrenner, Assistant Solicitor  
Division of Indian Affairs

From: Tim Vollmann, Attorney *Tim Vollmann*  
Division of Indian Affairs

Subject: The Nature of Aboriginal Indian Title

In essence, the claim of the Passamaquoddy Indian Tribe is one for aboriginal Indian title. The subject most recently received treatment by the Supreme Court in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). There the court stated:

"It very early became accepted doctrine in this Court that although fee title to the lands occupied by 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 the 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." Id. at 667.



The court's characterization of the Indian interest as a "right of occupancy" of course does little to suggest the extent of that right, or the remedies for its infringement. As mentioned in the quoted passage, it is inalienable without the consent of the United States. See also Johnson v. McIntosh, 21 U.S. 543 (1823). Also well known is the principle that the taking of aboriginal title by the sovereign is not compensable under the Fifth Amendment in the absence of gratuitous legislation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). But these rules do little to suggest what rights accrue to the Indian titleholder in the absence of extinguishment. Indeed, the very use of the phrase, "right of occupancy", could suggest no more than a usufructory interest subject to paramount rights in the holder of the fee.

Aboriginal title first received lengthy treatment by the Supreme Court in Johnson v. McIntosh, supra. However, little was said there about the extent of that right. As in Oneida, the court called it a "right of occupancy." 21 U.S. at 574. It also held that the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . ." [Emphasis added.] Id. Beyond that, the court said only that "[i]t has never been contended, that the Indian title amounted to nothing" [Id. at 603], and that "[a]ll our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." Id. at 588. From this the court proceeded to its ultimate

holding that Indian title is inalienable without the consent of the crown. 1/

1/ Interestingly, a pre-Johnson v. McIntosh opinion of the Attorney General offers a much more comprehensive view of the privileges inherent in Indian title. It is quoted in F. Cohen, Handbook of Federal Indian Law (1942) at page 293:

"The answer to this question [whether the owner of the fee interest in Seneca lands may enter the lands to make a survey] depends on the character of the title which the Indians retain in these lands . . . . The conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe which shall have removed voluntarily, or become extinguished by death. So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent . . . . Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent . . . . [T]heir title is original, sovereign, and exclusive . . . .

"It is said that the act of ownership proposed to be exercised by the [fee titleholder] will not injure the Indians, nor disturb them in the usual enjoyment of their lands; but of this the Indians . . . are the proper and the only judges . . . .

Then in Worcester v. Georgia, 31 U.S. 515 (1832), the Supreme Court called Indian nations "the undisputed possessors of the soil, from time immemorial" (*id.* at 559), having "a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent." *Id.* at 560, quoted in Oneida Indian Nation, 414 U.S. at 670. The Worcester opinion also offered what may now be the most common characterization of the nature of the pre-emptive fee title to aboriginal Indian lands, which fee is held either by the sovereign conqueror or its grantee: "It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." *Id.* at 544. Again, however, the court apparently found no need to discuss in detail the extent of the Indian right of occupancy.

Shortly thereafter, in Mitchel v. United States, 34 U.S. 711 (1835), the Supreme Court offered the most comprehensive discussion of Indian title to date. That case involved the question of the validity of a grant from the Seminole Indians during British sovereignty over Florida. The conveyance had been made with the approval of the colonial governor. The United States later claimed title superior to that of the grantee, but

1/ cont'd

"I am of the opinion that it is inconsistent, both with the character of the Indian title and the stipulations of their treaty, to enter upon these lands, for the purpose of making the proposed surveys . . . ."  
1 Op. A.G. 465, 466-67 (1821).

the Supreme Court ruled that the grantee's title was complete because the conveyance had had the blessing of the sovereign conqueror at the time it was made. In so ruling, the court described the unique process of conveyance of Indian title:

"[F]riendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

"Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete."  
34 U.S. at 745-46.

The court also had occasion to discuss the nature of this right of Indian occupancy, how it is measured, and how it might be enjoyed:

"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." Id. at 746.

This suggests first of all that the boundaries of Indian title are defined by traditional modes of Indian life. A tribe's territory might range as far as its members customarily traveled to hunt and fish in order to supply their people's needs. It was not limited by reference to sown fields, pastures, or villages.

In addition, this last passage suggests some definition to the scope of the Indians' right of occupancy within a given territory. One reading might suggest that this right may only extend to traditional uses--not including, for example, the operation of an industrial park or a modern recreational development. <sup>2/</sup> This reading may be gleaned from the text by focusing upon the reference to "their right to its exclusive enjoyment in their own way." [Emphasis added.] However, since this right is also "exclusive", it must mean more than a present-day right to

<sup>2/</sup> Felix Cohen called this the "menagerie" theory of Indian title: "the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined." F. Cohen, Original Indian Title, 32 Minn. L. Rev. 28, 58 (1947). See also Handbook of Federal Indian Law (1942) at 288.

carry hunting and fishing licenses without payment of a fee. Indeed, exclusive enjoyment can mean no less than that outsiders may not interfere with the Indians' use of the land in any way. Note that the 1821 opinion of the U.S. Attorney General, quoted in footnote 1, supra, held that the nature of Indian title was sufficient to prevent the fee titleholder from conducting a survey on lands subject to Indian use and occupancy.

Moreover, neither the facts nor the language of Mitchel compels a reading which would limit Indian occupancy to traditional use patterns. Indian customs and folkways are there referred to only in the past tense, viz.: "their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected . . . ." [Emphasis added.] The court was apparently making reference to the fact that Indian title had historically been accorded great respect. Thus, that passage may be more persuasively read as a description of what had been, rather than as a restriction on what might be.

In any event, subsequent rulings of the Supreme Court made it clear that the Indian right of occupancy is not so limited. In United States v. Cook, 86 U.S. 591 (1874), the court held:

"This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances." Id. at 593.

In Cook the court voided a sale of timber on the ground that it was appurtenant to restricted Indian land. However, a distinction was made where the timber was felled for purposes of improvement of the realty. In such cases, it was said that the timber might then be lawfully sold because it had been rightfully severed from the land. The court held: "The improvement must be the principal thing,



and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized." Id. And in dictum the court added: "What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservation, 3/ but no more." Id. at 594. The Cook decision would apparently permit any Indian use of restricted land short of alienation of the natural resources. And that limitation is much less onerous today, since there are now statutes providing specific authority for natural resource development on Indian lands. See e.g., 25 U.S.C. §§ 396a, 407. Additionally, if the court's analogy to life tenants and remaindermen is to be given the force of law, it should be noted that modern property law permits life tenants greater liberty in the alteration and improvement of the realty. 51 Am.Jur.2d Life Tenants and Remaindermen § 33.

Later in Butts v. Northern Pacific R.R., 119 U.S. 55 (1886), the Supreme Court indicated that the Indian right of occupancy is protected against railroads, wagon roads, and even telegraph lines across aboriginal lands until the United States acts either to extinguish Indian

3/ The Supreme Court has made no distinction between Indian tenure on lands aboriginally held as opposed to lands reserved by treaty, the latter being the situation in Cook. In Minnesota v. Hitchcock, 185 U.S. 373 (1902), the court acknowledged that (except where a treaty might provide otherwise) there is indeed no difference:

"Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians." Id. at 388-89.

title or otherwise to encumber it. Id. at 68. That case dealt with a grant of the fee to a railroad company by the United States. The court held that such a grant gave only a pre-emptive right to acquire complete title at such time as the federal government consented to extinguishment of the Indian right of occupancy. In that particular case, complete cession of the tribes' title was conditioned in an agreement upon the payment of money consideration and ~~the Indian's voluntary abandonment of their lands.~~ Until those conditions were met, the railroad could not effectuate its pre-emptive right. Id. at 69-70. <sup>4/</sup> Notable about that case is the fact that the United States had entered into a treaty with the tribes which permitted only partial interference with their occupancy rights, namely, rights-of-way across the Indian lands. Id. at 68. Only later was complete Indian title extinguished pursuant to the aforementioned agreement. Thus, the Indians' right of occupancy was viewed as having multiple dimensions.

In Cramer v. United States, 261 U.S. 219 (1923), the Supreme Court laid to rest any lingering notion that the right of occupancy secured no more than the Indians' traditional lifestyle. There the Court protected the occupancy of three individual Indians to a fenced and cultivated tract of approximately 175 acres of land in California. The lands in question had earlier been designated as part of a reservation by a treaty which Congress never ratified. Thus, the Indian claim was necessarily grounded in aboriginal rights of occupancy. Said the court:

<sup>4/</sup> However, the court also held that final extinguishment in that case need not await Congressional ratification of the agreement because there was sufficient authority in the Congressional grant to the railroad which stipulated that Indian title would be extinguished "as rapidly as might be consistent with public policy and the welfare of the Indians." Id. at 70-71.

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. [citations]

It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life.

That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. [citations]

That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holding of non-reservation Indians against the efforts of white men to dispossess them." Id. at 227.

Also of note in Cramer is the fact that sufficient proof of aboriginal occupancy was established by evidence of continuous possession only since 1859, and that there was evidence that the Indians did not possess the tract in question as recently as 1851. Id. at 226, 231.

Perhaps the most definitive discussion of the scope of Indian title may be found in United States v. Shoshone Tribe, 304 U.S. 111 (1938). This was a claims case brought pursuant to a special jurisdictional act. The claim arose when the United States permitted a band of Arapahoes to share the Wind River Reservation in Wyoming with the Shoshone Tribe. The Shoshones thus claimed the taking of an undivided one-half interest in their treaty reservation. At issue before the Supreme Court was whether the Shoshones' right of occupancy included the timber and mineral resources within the reservation, and whether the extraction of those resources should be considered in determining the Tribe's damages.

The Government had argued that that right was "limited to those uses incident to the cultivation of the land and the grazing of livestock" and that original Indian title comprised only a "usufructuary right." See F. Cohen, Original Indian Title, 32 Minn.L.Rev. 28, 54, (1947). The court first characterized the issue as one of treaty interpretation: "[W]e are now called upon to decide, whether, by the treaty, the tribe acquired beneficial ownership of the minerals and timber on the reservation." 304 U.S. at 116. And the opinion often refers to the creation of the reservation as a "grant." However, reliance is placed on case law dealing with aboriginal Indian title, and the court appears to acknowledge that the treaty merely secured aboriginal rights:

"Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. Cherokee Nation v. Georgia, 5 Pet. 1, 48; Worcester v. Georgia, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe

had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial." Id. at 117 [emphasis added.]

The court then held that the Shoshones' right of occupancy included the timber and minerals on the land. It was Felix Cohen's view that this case effectively defined the scope of aboriginal ownership. Original Indian Title, supra at 54-55. However, one court suggested later that the Supreme Court's decision in Shoshone Tribe hinged entirely on a question of treaty interpretation. Edwardson v. Morton, 369 F. Supp. 1359, 1372, n.26 (D.D.C. 1973); see discussion, infra. It does appear, nonetheless, that the Supreme Court did offer alternative bases for the Shoshones' rights. And the Shoshone treaty itself speaks both in terms of a grant and of a reservation, the latter construction suggesting acknowledgement of aboriginal rather than treaty-created rights. It "set apart [the reservation lands] for the absolute and undisturbed use and occupation of the Shoshone Indians . . . ." 15 Stat. 673, 674 (1868). But it also provided that the Shoshones "relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as embraced within the limits aforesaid." Id. [emphasis added].

Whether or not Shoshone Tribe stands for the proposition that aboriginal Indian title includes rights to natural resources, its companion case, United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938), would appear to do so. At issue there was whether the Tribes were entitled to the value of the timber as part of the compensation for the taking of their lands. In its opinion the Supreme Court focused its concern on whether the treaty diluted aboriginal rights, rather than whether the treaty granted any rights:

"The tract taken was part of the reservation retained by plaintiffs out of the country held by them

in immemorial possession, from which was made the cession by the treaty of October 14, 1864. The clause declaring that the district retained should, until otherwise directed by the President, be set apart as a residence for the Indians and 'held and regarded as an Indian reservation' clearly did not detract from the tribes' right of occupancy." Id. at 122-23 [emphasis added.]

The court then reached the same conclusion as in Shoshone Tribe, and in reliance thereon. Thus, when Shoshone Tribe is read together with Klamath, it seems clear that aboriginal Indian title includes the right to natural resources.

Interestingly, the Supreme Court in Shoshone Tribe also rejected dicta in United States v. Cook, supra, to the effect that (1) the right of occupancy did not include the right to alienate timber and that (2) Indians are the equivalent of life tenants on their lands. Said the court:

" [Cook] did not involve adjudication of the scope of Indian title to land, minerals, or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe . . . . It was not there decided that the tribes' right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant." 304 U.S. at 118.

While the above precedent is important in the way it defines Indian title, it does not take the further step to suggest whether this right gives rise to an action for damages for third-party trespass to aboriginal Indian lands. <sup>5/</sup> The Shoshone Tribe and Klamath cases themselves dealt only with the measure of compensation for a taking of Indian title by the United States. Perhaps the first case to treat the issue of third-party trespass was Marsh v. Brooks, 49 U.S. 223 (1850). There it was held that an action for ejectment could be brought to secure the Indian right of occupancy. The opinion stated:

"[T]he Indian title, such as it was before the treaty . . . consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action for ejectment could be maintained on an Indian right to occupancy and use, is not open to question. [Citing Johnson v. McIntosh, supra.]" Id. at 232.

This case might be distinguished on the ground that the Indian occupants subsequently acquired fee title by an Act of Congress. However, the Supreme Court only referred to that fact as "in addition to the reserved Indian rights." Id. Thus it is apparent that the court believed that an allegation of the right of occupancy alone was sufficient to maintain the action.

<sup>5/</sup> Note, however, that Cramer v. United States, supra, stands solidly for the proposition that the United States may sue to quiet Indian title on behalf of the beneficial owners.

Nearly one hundred years later the Supreme Court decided the principal case on this issue: United States as Guardian of the Walapai Tribe v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941), rehearing denied 314 U.S. 716 (1942).

There the government sought to quiet title to the Indian lands and also sought an accounting from the railroad "for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy." Id. at 344. The railroad itself had acquired the fee to the lands in question subject to Indian title. The Congressional enactment making that grant provided further that "[t]he United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act . . . ." Act of July 27, 1866, § 2, 14 Stat. 294.

The only claim the Walapais had to the lands in question was one founded in aboriginal possession. No treaty had been entered into with the United States, and the circuit court of appeals had found the lack of statutory recognition of the Walapais' possessory rights fatal to the Indians' claim. The Supreme Court reversed, holding explicitly that such recognition is unnecessary, and that a claim of trespass to lands held under original Indian title is sufficient to state a cause of action. 314 U.S. at 347, 359.

However, the court offered little or no discussion of the types of activities which may have amounted to trespass, or the appropriate measurement of damages for any given act of trespass. One might take the court's ruling as implicit approval of the government complaint's suggested accounting "for all rents, issues and profits derived from the leasing, renting or use of the lands . . . ." Indeed, the court held that "[t]he United States is entitled to an accounting as respects any or all of the lands in the first cause of action which the Walapais did in fact occupy exclusively from time immemorial." Id. at 359. But no alternative measurements appear to have been considered by the court.



The next Supreme Court decision which is now relied upon on the subject of aboriginal Indian title is Tee-Hit-Ton Indians v. United States, 348 U.S. 313 (1955), rehearing denied 348 U.S. 965. <sup>6/</sup> There the court held only that the taking of aboriginal title by the United States is not compensable under the Fifth Amendment in the absence of gratuitous authorizing legislation from Congress. By itself, that holding should be of little moment in the Passamaquoddy case since no such compensation is now sought by the Tribe. Indeed, it is claimed that the Indian title was in fact never taken by the United States. However, attention must be paid to the Tee-Hit-Ton opinion for the way in which it characterized Indian title in reaching its conclusion. It called that right one of "mere possession," and added:

"This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."  
Id. at 279.

While the opinion might be seen as helpful in its acknowledgement of the sovereign duty to protect against third-party trespass, its apparent deemphasis of the importance of Indian title could prove troublesome. For example, reliance was placed on the language of Tee-Hit-Ton by the U.S. District court in Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973), the Arctic Slope trespass case. After

<sup>6/</sup> The plurality opinion in Alcea Band of Tillamooks v. United States, 329 U.S. 40 (1946) was heavily relied upon in discussions of the compensability of Indian title until it was severely distinguished in Tee-Hit-Ton.

lengthy citations to Tee-Hit-Ton the district judge concluded: "Thus, until Congress has acted to extinguish Native title in land claimed on the basis of use and occupancy, any third parties coming onto the land without consent of those rightfully in possession are mere trespassers." Id. at 1371. Then as to the proper remedies for such trespasses, the court added:

"The Tee-Hit-Ton court's characterization of Native rights as being those of 'mere possession' as opposed to 'ownership' should not preclude Natives from maintaining an ordinary tort action for trespass to land and suing for the recovery of, inter alia, the value of any resources actually extracted from Native lands by trespassing third parties. The Tee-Hit-Ton Court did, it is true, retreat from the sweeping language of some earlier cases, notably Walapai Tribe, supra, but nothing in Tee-Hit-Ton suggests that Natives could not recover for actual extraction of, e.g., sand and gravel, from their lands by unauthorized third parties even if the United States can be said to hold the title to all realty, including minerals in place. Such extraction would clearly involve a physical invasion of lands and would thus violate Native rights to undisturbed use and occupancy.

"On the other hand, the Tee-Hit-Ton Court cited Johnson v. McIntosh . . . for the proposition that Natives holding land on the basis of aboriginal use and occupancy have no alienable interest in such land. [citation] Thus such Natives

could not themselves sell interests in the land or its resources to third parties, and it does not appear, therefore, that they could have any legal interest in money received for the sale of property rights such as mineral leases. Native possessory rights as defined by the Tee-Hit-Ton Court guarantee the occupants protection from intrusion rather than a share in vendable interests in the lands." Id. at 1371-72 [emphasis in original; footnotes omitted].

It is not clear whether or to what degree there may be any difference in the measure of damages for extraction of Indian natural resources depending upon whether one looks to the "intrusion" or to the "vendable interest." Apart from any distinctions made on the basis of "property rights" versus "possessory rights," it may be said that the cases vary considerably on the question of the appropriate measure of damages for such trespass. Some look to the decreased value of the realty; others look to the market value of the extracted resources; and still others look to the value of the resource in situ, or prior to the extraction. See generally Annotation, 1 A.L.R.3d 801 (1965); 54 Am.Jur.2d Mines and Minerals, §§ 253-54; 52 Am.Jur.2d Logs and Timber, § 126 et seq. Thus, the distinctions made in Edwardsen may be of little moment. Indeed, that opinion is subject to expansive interpretation, given its reference to "recovery of, inter alia, the value of any resources actually extracted."

There is, however, the suggestion in one Edwardsen footnote (369 F. Supp. at 1372, note 24) that Tee-Hit-Ton calls into question the method of accounting for "rents, issues, and profits" used in Walapai Tribe. But, the Edwardsen court does not point out that restricted Indian lands may now

apparently be leased for a number of purposes pursuant to statutory authority and that the beneficial Indian owners stand to collect the proceeds of such leases. See e.g., United States v. 9,345.53 Acres of Land, 256 F. Supp. 603, 607 (W.D.N.Y. 1966); 25 U.S.C. § 415. Thus, the unlawful extraction of Indian natural resources may arguably give rise to liability measured by the amount of the profit to the trespasser, notwithstanding a conclusory assertion that Indian title is only a possessory right.

Another footnote in Edwardsen (369 F. Supp. at 1372, note 26) rejects the plaintiffs' offer of United States v. Shoshone Tribe, *supra*, as standing for the proposition that Indian title includes every element of value which would accrue to a fee titleholder. The district judge views that case as doing no more than construing a treaty. However, not mentioned in Edwardsen is the companion case of United States v. Klamath and Moadoc Tribes, *supra*, which took a similarly expansive view of Indian title while looking to the tribes' right of occupancy as it existed prior to any treaty.

Finally, the 1974 Supreme Court opinion in Oneida Indian Nation v. County of Oneida, *supra*, eliminates most of the confusion caused by Tee-Hit-Ton. While not offering a detailed examination of the scope of Indian title, it nevertheless reasserts the importance of such title in its lengthy citation to Walapai Tribe (414 U.S. at 668-69), and in its holding that an ejectment or damages action founded in aboriginal Indian title raises an issue of federal law sufficient to support federal question jurisdiction in federal court. That case also reaffirmed the holding in Walapai Tribe that there need be no formal federal recognition of the Indian right of occupancy in order for it to be protected from third-party trespass. Id.

Additionally, it is also important to note in the context of the claims of the Passamaquoddy Tribe that the Oneida court acknowledged that fee title to the lands

claimed by the Oneidas lay in state or private ownership. Id. at 670. See also United States v. Boylan, 265 Fed. 165, 173 (2d Cir. 1920), which was a suit to eject private parties from restricted aboriginal lands of the Oneida Tribe. Since the Passamaquoddy claim lies within the boundaries of the thirteen original states, the pre-emptive fee lay initially in the state, i.e., the Commonwealth of Massachusetts. Nevertheless, federal law still governs the alienation of the Indian interest.

What emerges clearly from the above precedent is the principle that original Indian title, however it may be characterized, is protectible against third-party trespassers. Furthermore, the Indian right of occupancy is exclusive, and numerous forms of activities on Indian lands, including activities conducted by the owner in fee, have been deemed inconsistent with that exclusive right and are therefore trespassory. Indeed, in light of this precedent, it is clear that any activity on Indian lands conducted without the consent of the beneficial Indian owners amounts to actionable trespass. Therefore, we should proceed on the assumption that Indian title is--apart from its basic inalienability and noncompensability--no different from fee title ownership. This attitude is both justified and compelled by the fact that no court has ever treated trespass to Indian land as less injurious than a trespass to any other land. Nor, has any court ever suggested a different measure or formula for determining trespassory damages with respect to the Indian right of occupancy. Indeed, the Supreme Court has often called aboriginal Indian title "as sacred as the fee simple of the whites." Mitchel v. United States, supra, 34 U.S. 746; Oneida Indian Nation v. County of Oneida, supra, 414 U.S. at 668-69.