

American Indian Law Review

Volume 5 | Number 2

1-1-1977

Natural Resources: Federal Control Over Indian Timber

Joe D. Dillsaver

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Joe D. Dillsaver, *Natural Resources: Federal Control Over Indian Timber*, 5 AM. INDIAN L. REV. 415 (1977), <https://digitalcommons.law.ou.edu/ailr/vol5/iss2/9>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

NATURAL RESOURCES: FEDERAL CONTROL OVER INDIAN TIMBER

Joe D. Dillsaver

Federal control over Indian timber dates back to the beginning of government control over Indian tribes.¹ As early as 1861 tribes were entering into contracts for the sale of the timber on their lands.² The purpose of this paper is to provide an examination of the federal government's Indian timber policy from 1861 to the present. The focus will be on the statutes, regulations, and court decisions that molded this federal timber policy.

Historical Development

After the Chippewas entered into an agreement in 1861, there are several instances of individual tribes contracting to sell timber or timber products. Among them were the Stockbridge and Munsee Indians next to the Menominee Reservation³ in Wisconsin and the Tulalip Reservation in Washington.⁴ In 1873 *United States v. Cook*⁵ addressed the extent of use that Indians could make of their timber. The Court noted that the timber could not be cut by them for the purpose of sale alone. It had to be connected with the clearing of the land to make it more suitable for agriculture.⁶ Two other points in the case are also significant. First, the statement of the policy that Indians only had the right to occupancy of the land with the presumption against cutting and selling the timber.⁷ The Indians were only entitled to wood necessary for their own personal use. The fee of the timber land remained in the federal government.⁸ Second, *Cook* adds that the government has the right to maintain whatever action is necessary to recover for timber wrongfully sold. In this case the action was replevin.⁹

On February 16, 1889, Congress passed a statute which directed executive action toward Indian timber.¹⁰ The act gave the President discretionary power to authorize Indians on tribal lands "to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen . . . for the sole benefit of such Indian or Indians."¹¹ The significance of this statute was the declaration that at least some of the timber on Indian lands could be used in a direct, commercial sense.

Three cases arose between the enactment of the February 16, 1889, statute and the next major statute in 1910.¹² The first, *Pine River Logging Co. v. United States*, confirmed the earlier holding of *Cook*.¹³ In 1907 the Supreme Court decided *United States v.*

*Paine Lumber Co.*¹⁴ Here, the Court recognized that tribes have a vested interest in their lands by treaty which authorized the cutting of timber for sale and not for the improvement of the land.¹⁵ Also, approval of the Secretary of the Interior was not needed before the actions were taken.¹⁶ The language of Judge McKenna's opinion expresses vividly the right to cut and sell timber without designating the land for later cultivation.

We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose[s]. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee¹⁷ be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber denied? Nor does the argument which makes the occupation of the land a test of title to the timber seem to us more adequate to justify the qualification of the Indians' rights. . . . The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear of their timber, and yet, it is insisted, that this improvement may not be made, though it have the additional inducement of providing means for the support of the Indians and their families. We are unable to assent to this view.¹⁸

The Supreme Court in 1908 clarified the holding of *Paine* in *Starr v. Campbell*.¹⁹

A statute of major importance was passed in 1910 concerning the function of governmental administration of tribal timber.²⁰ Chapter 431 of 33 *Statutes at Large* delineated the procedure the government was to follow. Section 7 stated: "That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct."²¹ Section 8 adds that the timber may be sold with the consent of the government.²²

The 1910 law reflects several key ideas. First, it establishes the policy of governmental approval over the sale of timber. The policy reverses *Paine*.²³ Section 7 also allows the Secretary of the Interior to use the proceeds of the timber sales for the benefit of the Indians.²⁴ While the statute points to the fact that it is limited to

unallotted lands, later court decisions indicate that the Secretary's use of timber proceeds applies to allotted lands as well.²⁵

A series of Department of the Interior decisions and court cases after 1910 have further delineated the government's policy of Indian timber regulation. *United States v. Algoma Lumber Co.*²⁶ dealt with whether the government or the Klamath Indians were responsible for the contracts of sale of timber made by the Indians for the sale of that timber. The Court decided that the Indians were the binding contractual parties. The opinion also included several reflections on the governmental control of Indian timber. First, *Algoma* agreed with Chapter 431 of 33 *Statutes at Large*.²⁷ The court also indicated that only the beneficial interest in the land on which the timber was located remained in the tribe.²⁸

*Eastman v. United States*²⁹ likewise dealt with the basic provisions of Chapter 431 of 33 *Statutes at Large*. *Eastman* centered on allotted Indian lands, while *Algoma* seemed to focus on both allotted and unallotted lands.³⁰ The Court held that it was the intent of Congress to "prescribe definitely the terms" upon which the Indians could do business with their timber.³¹ The intent of the statute was to "broaden rights of Indians as to sale of timber on lands valuable chiefly for timber."³² Also stated in Chapter 431 of 33 *Statutes at Large* was that the Secretary of the Interior could refuse "his consent to such a sale [of timber] without giving any reason," but that such consent could not be withheld based on "imposition of restrictions which he has no power to make."³³

A memorandum from the Solicitor of the Department of the Interior in 1948 expanded the right of secretarial approval to Alaskan Indian timber.³⁴ The question put to the Solicitor was whether a tribe whose possessory rights extended into the Tongass National Forest could legally sell the timber without the approval of the Secretary of the Interior.³⁵ The answer was that the Indians could not sell the timber without the consent of the government.³⁶ On October 29, 1953, the Solicitor in another memo echoed the same idea as the 1948 statement.³⁷ In 1953, however, the area was not Alaska but the Pacific Northwest. The memo asserted that the tribal timber sales contracts were not governmental ones but were Indian concerns.³⁸ This idea reflects the basic premise of *Algoma*.³⁹ The role of the government as supervisor was still present under the plenary⁴⁰ power of the United States.⁴¹ Still another memo⁴² echoed the same governmental responsibilities toward the control of Indian timber.

The problem of taxation, specifically capital gains treatment, was raised in the 1955 case of *Squire v. Capoeman*.⁴³ The problem

centered on income from the sale by the government of standing timber on allotted land in the Quinault Indian Reservation. The ultimate fee was held in trust by the government. The Supreme Court concluded that because of the provisions of Sections 5 and 6 of the General Allotment Act,⁴⁴ an Indian allottee did not have to pay any tax on his land.⁴⁵ Only when the federal government had conveyed a patent in fee simple would the restrictions on taxation be removed.⁴⁶

*Mole Lake Band v. United States*⁴⁷ mentioned briefly the relationship of the government and Indians as to timber resources. The Court stated that Indians were entitled to the proceeds of timber from their lands. The responsibility of the government was to administer the money received from the proceeds of the timber cut on reservation lands.⁴⁸ Two Solicitor's Opinions, in 1957⁴⁹ and 1950,⁵⁰ focus on more aspects of the federal-Indian timber situation. The 1957 opinion reviewed the procedure of the government to redetermine stumpage prices upon the finding of changed marketing conditions, technological developments, or "character of the operations."⁵¹ The Solicitor also reaffirmed the *Algoma*⁵² contention that contracts for Indian timber were not public but private contracts between the Indians and the contracting parties.⁵³ The 1958 memo pointed out that the government should not approve the sale of allotted timber without the approval of all the owners of the land.⁵⁴ But the memo also stated that if the timber had been "damaged by fire, insects, or disease" and might become worthless within a short period of time, the part-owner could sell to protect from further loss.⁵⁵

Barclay v. United States was a 1964 case from Oregon which also touched on federal control of Indian timber.⁵⁶ The June 25, 1910, statute⁵⁷ recognizing the power to control the sale of Indian timber is pinpointed.⁵⁸ The decision also confirmed the authority of the government to "approve or disapprove sales made by allottees who alone could transfer ownership of timber on their land."⁵⁹ The power of the allottee over the disposition of the timber was further demonstrated by the Court stating that a government survey and selection of trees to cut had "no effect" as to the sale of timber until the allottees agree to sell it.⁶⁰

A final case spotlighting federal control of Indian timber was *Quinault Allottee Assoc. v. United States*.⁶¹ This was a class action by owners of Indian allotments on the Quinault reservation in Washington. They were seeking to recover administrative charges which the government had deducted from proceeds of sales of timber from the allotments of the reservation.⁶² The Court of

Claims found, *inter alia*, that the government could charge administrative fees from the proceeds of timber sales.⁶³ These fees arose from the administration of the trust relationship with the Indians by the government. The charges levied did not constitute a tax in violation of the tax exemption status afforded by the General Allotment Act of 1887.⁶⁴

The cases and materials discussed *supra* indicate a uniform general approach by the government to the administration of Indian timber. Felix Cohen's overview of this control seems on point, even though it was written more than thirty years ago.⁶⁵

It must therefore, be taken as settled law at the present time, that in the absence of specific language to the contrary the establishment of an Indian reservation for the use and occupancy of the Indians conveys to the Indians an interest in the timber of the reservation as complete as is the tribal interest in the land itself, that the cutting and alienation of such timber is subject to congressional legislation, and that the wrongful acts of individual Indians, vendees of timber, or agents of the United States Governments cannot deprive the Indian tribe of its interest in tribal timber, or of its right to receive the proceeds of timber cut and alienated without consent of the tribe.

Current Federal Regulations

Thus the focus of this study so far has been on the general principles of federal control of Indian timber largely from a historical development perspective. The following section will provide a discussion of the current federal rules which control Indian timber. Title 25 of the *Code of Federal Regulations* deals with Indians and Sections 141, 142, and 144 specifically cover timber. Section 141⁶⁶ deals with "general forest regulations." Section 142⁶⁷ controls "sale of lumber and other forest products" produced by Indian enterprises from the forests on Indian reservations. Section 144⁶⁸ is specifically directed to the "sale of forest products, Red Lake Indian Reservation, Minn."⁶⁹

Subsections (1)⁷⁰ and (2)⁷¹ of Section 141 cover definitions and scope. The objectives of the whole section appear in subsection (3).⁷² These objectives include management, self-sustaining Indian communities "highest and best use of the land," and meeting the "present and future financial needs of the owner and his heirs."⁷³ Subsection (4)⁷⁴ deals with sustained yield management of the

timber and subsection (5)⁷⁵ with cutting restrictions. Subsection (6)⁷⁶ covers "Indian Operations" and is prefaced with the line "Subject to approval by the Secretary." Timber sales from unallotted and allotted lands are in subsection (7).⁷⁷ Subsections (8) through (16)⁷⁸ handle the mechanisms of contracting and selling the timber. The actual cutting of the timber is in subsections (17), (19), and (20).⁷⁹ The allowance for deduction of administrative expenses is authorized under subsection (18).⁸⁰ The final subsections (21),⁸¹ (22),⁸² and (23)⁸³ cover fire protection, trespass, and appeals of timber contracts.

As mentioned above, Section 142 addresses the sale of timber and timber products by Indian enterprises from reservation timber. The subsection breakdown is as follows⁸⁴: Definitions are covered in (1). The meaning of "forest products" includes "lumber, lath, shingles, crating, ties, bolts, logs, bark, pulpwood, or other marketable materials obtained from forests and authorized for removal by the Indian enterprises." Subsections 142(2) and (3) are housekeeping devices for the application of the regulation. The selling of the products in the open market is in subsection (4). Advertising provisions are included in (5) and (6). Subsections (7) through (12) contain the general procedures for handling the mechanics of the purchase and sale of the forest products.

Conclusion

The purpose of this paper has been to provide an overview of federal control of Indian timber. This included a look at the historical background of the control, cases, and memorandum opinions of the Department of the Interior, and ended with a brief discussion of the federal regulations pertinent to the immediate functioning of governmental control of Indian timber. However, there is one additional area, the future, that deserves comment. A heuristic examination such as referring to the future policy of the federal government toward Indian timber does nothing but invite conjecture. Several suggestions or insights have already developed. One source pointed out that "a tribal corporation or agent with a profit incentive would seem to offer the best chance of maximizing return and assuring a continuous yield (from the timber)."⁸⁵ Another suggested that the development of Indian lands policy and the formulation of that policy is tied directly to one circumstance: the relationship of the various tribes with the federal government. The shape of that relationship will be the key to the future federal policy toward the control of Indian timber.

NOTES

1. For a background, see J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON, 254 (1937).
2. Commissioner of Indian Affairs, 1861, noted in KINNEY, *id.* The tribe was the Chippewas located at Rabbit Lake in Minnesota.
3. Commissioner of Indian Affairs, 1861, noted in KINNEY, *id.*
4. Commissioner of Indian Affairs, 1969, noted in KINNEY, *id.*
5. 8 U.S.(19 Wall.) 591 (1873).
6. *Id.*
7. *Id.*
8. *Id.* at 592.
9. *Id.* See also F. COHEN, FEDERAL INDIAN LAW 316 (1942). Cohen asserts that the government may use either civil or criminal proceedings to protect the tribal rights in the timber. In addition to replevin, other remedies available include trover, injunctive relief, and the appropriate criminal sanctions.
10. Act of Feb. 16, 1889, 25 Stat. 673.
11. *Id.*
12. Act of June 25, 1910, 33 Stat. 855, ch. 431, §§ 7, 8.
13. 186 U.S. 279 (1902).
14. 206 U.S. 467 (1907).
16. *Id.*
17. For a discussion of allotments, see COHEN, *supra* note 9, at 206 *et seq.*
18. 206 U.S. 467 (1907).
19. 208 U.S. 527 (1908). This case deals with land that was all timber. The land in *Paine* was arable and of no use until the timber was cut. This was not the situation in *Starr* where the land had little value outside the timber. The Court concluded that the timber in *Starr* could not be sold without the approval of the government.
20. Act of June 25, 1910, 33 Stat. 855, ch. 431, §§ 7, 8.
21. *Id.*
22. *Id.*
23. 206 U.S. 467 (1907).
24. Act of June 25, 1910, 33 Stat. 855, ch. 431, §§ 7, 8.
25. See *Eastman v. United States*, 31 F. Supp. 754 (D. Wash. 1940).
26. 305 U.S. 415 (1939).
27. *Id.* at 417.
28. *Id.* at 420.
29. 31 F. Supp. 754 (D. Wash. 1940).
30. See 305 U.S. 415, 416 (1939).
31. *Eastman v. United States*, 31 F. Supp. 754 (D. Wash. 1940).
32. *Id.*
33. *Id.*
35. *Id.* at 144.
36. *Id.*
37. M-36185, 61 I.D. 223 (1953).
38. *Id.* 225.
39. 305 U.S. 415 (1939).
40. For a discussion of plenary power, see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).
41. M-36185, 61 I.D. 223 (1953).
42. M-36338, 63 I.D. 147 (1956).
43. 351 U.S. 1 (1955).
44. 25 U.S.C. §§ 331 *et seq.*
45. 351 U.S. 1 (1955).
46. *Id.*
47. 139 F. Supp. 938 (Ct. Cl. 1956).
48. *Id.* at 491.
49. M-36461, 64 I.D. 305 (1957).

50. M-36477, 65 I.D. 101 (1958).
51. M-36461, 64 I.D. 305 (1957) at 307.
52. 305 U.S. 415 (1939).
53. *Id.*, 59 S.Ct. at 309.
54. M-36477, 65 I.D. 101 (1958).
55. *Id.* at 106.
56. 333 F.2d 847 (Ct. Cl. 1964).
57. Act of June 25, 1910, 33 Stat. 855, ch. 431, §§ 7,8.
58. 333 F.2d 847, 848 (Ct. Cl. 1964).
59. *Id.* at 849.
60. *Id.*
61. 485 F.2d 1391 (Ct. Cl. 1973).
62. *Id.*
63. *Id.*
64. *Id.*
65. COHEN, *supra* note 9, at 315.
66. 25 C.F.R. § 141 contains 23 subsections.
67. 25 C.F.R. § 142 contains 12 subsections.
68. 25 C.F.R. § 144 contains 15 subsections.
69. Because of the specific application of this section, the rest of the discussion will be limited to Sections 141 and 142.
70. Section 141 was originally 24 Fed. Reg. 7870 (1959) *as amended at* 27 Fed. Reg. 12929 (1969).
71. Section 141.2 was originally 24 Fed. Reg. 7870 (1959)
72. Section 141.3 was originally 29 Fed. Reg. 14740 (1964).
73. 25 C.F.R. § 141.3.
74. Section 141.4 was originally 24 Fed. Reg. 7870 (1959).
75. Section 141.5 was originally *id.*
76. Section 141.6 was originally 27 Fed. Reg. 12929 (1962).
77. Section 141.7 was originally 38 Fed. Reg. 24638 (1973).
78. For the original Fed. Reg., see 25 C.F.R. §§ 141.8-141.16.
79. For the original Fed. Reg., see 25 C.F.R. § 141.17,
80. Section 141.18 was originally 27 Fed. Reg. 12929 (1962).
81. Section 141.21 was originally 24 Fed. Reg. 7872 (1959).
82. Section 141.22 was originally 24 Fed. Reg. 12366 (1963).
83. Section 141.23 was originally 24 Fed. Reg. 7872 (1962).
84. These all originally appeared in 29 Fed. Reg. 12929 (1967).
85. *A Study of BIA Timber Management on the Quinault Indian Reservation 1950-1970: Hearing Before the Subcomm. on Administrative Practice & Procedure of Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (statement of Robert E. Beaty).
86. Note, *Economic Development of Indian Reservations: Increasing Tribal Participation, Limiting Federal Control*, 48 TUL. L. REV. 649 (1974).