JUL 2 1979

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* ALSO ADMITTED TO FLA. BAR

June 29, 1979

Read 6-24-80

Mr. Purcell Powless
Mr. Harry Doxtator
Mr. Robert W. Burr, Jr.

Re: Wilson, et al, vs. Omaha Indian Tribe

Gentlemen:

I enclose an excerpt from the recent decision of the U.S. Supreme Court in the above case. In my opinion, the Supreme Court has greatly strengthened your case by upholding the usefulness and the present-day applicability of 25 USC 194 to Indian Tribes and Nations.

You will recall that this section was specifically invoked in the two complaints we filed in Federal Court actions. It provides that the burden of proof is on the other party.

The Supreme Court held that 25 USC 194 does not operate against states, but it certainly seems to apply to other litigants. There is also an indication that the statute may not apply in eastern lands, but that is not necessary for the case and I think 25 USC does apply to your New York land.

Very truly yours,

BOND, SCHOENECK & KING

By George C. Shattuck

GCS/b
Enc.

cc: Larry A. Aschenbrenner, Esq.
Bertram Hirsch, Esq.

Nos. 78-160 AND 78-161

Roy Tibbals Wilson et al., Petitioners,
78-160 v.
Omaha Indian Tribe et al.

State of Iowa et al., Petitioners,
78-161 v.
Omaha Indian Tribe et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 20, 1979]

Syllabus

Pursuant to an 1854 treaty, the reservation of the Omaha Indian Tribe (Tribe) was established in the Territory of Nebraska on the west bank of the Missouri River, with the eastern boundary being fixed as the center of the river's main channel. In 1867, a General Land Office survey established that certain land was included in the reservation but since then the river has changed course several times, leaving most of the survey area on the Iowa side of the river, separated from the rest of the reservation. Residents of Iowa ultimately settled on and improved this land, and these non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs. Three federal actions, consolidated in District Court, were instituted by respondents, the Tribe and the United States as trustee of the reservation lands, against petitioners, including the State of Iowa and several individuals. Both sides sought to quiet title in their names, respondents arguing that the river's movement had been avulsive and thus did not affect the reservation's boundary, whereas petitioners argued that the disputed land had been formed by gradual accretion and belonged to the Iowa riparian owners. The District Court held that state rather than federal law should be the basis of decision; that 25 U. S. C. § 194—which provides that "[i]n all trials about the right of property in which an Indian may be a party on one side, and white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"—was not applicable because the Tribe could not make out a prima facie case that it possessed the disputed land in the past without proving its case on the merits; and that under Nebraska law, the changes in the river had been accretive and thus the petitioners were the owners of the disputed area. The Court of Appeals reversed, ruling that federal rather than state law was applicable; that the Tribe had made a sufficient showing to invoke § 194; and that applying the federal common law of accretion and avulsion to the evidence, the evidence was in equipoise and thus, under § 194, judgment must be entered for the Tribe.

Held:

1. The Court of Appeals was partially correct in ruling that § 194 is applicable here; by its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. In view of the history of § 194 and its purpose of protecting Indians from claims made by non-Indian squatters on their lands, it applies even when an Indian tribe is the litigant rather than one or more individual Indians. But, while Congress was aware that § 194 would be interpreted to cover artificial entities such as corporations as well as individuals, there is nothing to indicate that Congress intended the word "white person" to include any of the States of the Union. Here, there seems to be no question that the disputed land was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the 1854 treaty, and this was enough to bring § 194 into play. In view of the purpose of the statute and its use of the term "presumption" which the "white man" must overcome, § 194 contemplates the non-Indian shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

2. The Court of Appeals properly concluded that federal law governs the substantive aspects of the dispute, but it erred in arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion.

(a) The general rule that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways, *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, does not oust federal law in this litigation. Here, the United States has never yielded title or terminated its interest in the property, and in these circumstances, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677.

(b) However, state law should be borrowed as the federal rule of decision here. There is no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute (the location of the boundary between Iowa and Nebraska having been settled by Compact in 1943). Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. And this is also an area in which the States have substantial interest in having their own law resolve controversies such as these; there is considerable merit in not having the reasonable expectations, under state real property law, of private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Arkansas* v. *Tennessee*, 246 U. S. 158.

(c) Under the construction of the 1943 Compact in *Nebraska* v. *Iowa*, 406 U. S. 117, Nebraska law should be applied in determining whether the changes in the river that moved the disputed land from Nebraska to Iowa were avulsive or accretive.

575 F. 2d 620, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases. BLACKMUN, J., filed a concurring opinon, in which BURGER, C. J., joined.

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue here is the ownership of a tract of land on the east bank of the Missouri River in Iowa. Respondent Omaha Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands,[1] claims the tract as part of reservation lands created for it under an 1854 treaty. Petitioners, including the State of Iowa and several individuals, argue that past movements of the Missouri River washed away part of the Reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners.[2]

Two principal issues are presented. First, we are faced with novel questions regarding the interpretation and scope of 25 U. S. C. § 194, a 145-year-old, but seldom used, statute that provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on

[1] In *Heckman* v. *United States*, 224 U. S. 413 (1912), the Court explained the source and nature of this trust relationship. In the exercise of its plenary authority over Indian affairs, Congress has the power to place restrictions on the alienation of Indian lands. Where it does so, it continues guardianship over Indian lands and "[d]uring the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. . . . A transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.*, at 437-438. Accordingly, the United States is entitled to go into court as trustee to enforce Indian land rights. "It [is] not essential that it should have a pecuniary interest in the controversy." *Id.*, at 439. See also *Morrison* v. *Work*, 266 U. S. 481, 485 (1925); *Choate* v. *Trapp*, 224 U. S. 665, 678 (1912); F. Cohen, Handbook of Federal Indian Law 94-96 (1942).

[2] The State of Iowa claims title to certain lands deeded to it by quitclaim and to the bed of the Missouri between the thalweg (see n. 3, *infra*) and the ordinary high water mark, any islands formed in that portion of the river, and any abandoned channels. The latter claims are based upon the equal footing doctrine, see *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), and the 1943 Boundary Compact between Iowa and Nebraska, see n. 6, *infra*.

the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Second, we must decide whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.

I

In 1854 the Omaha Indian Tribe ceded most of its aboriginal lands by treaty to the United States in exchange for money and assistance to enable the Tribe to cultivate its retained lands. Treaty of March 16, 1854, 10 Stat. 1043; see *United States* v. *Omaha Indians*, 253 U. S. 275, 277–278 (1920). The retained lands proved unsatisfactory to the Tribe, and it exercised its option under the Treaty to exchange those lands for a tract of 300,000 acres to be designated by the President and acceptable to the Tribe. The Blackbird Hills area, on the west bank of the Missouri, all of which was then part of the Territory of Nebraska, was selected. The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[3] That land, as modified by a subsequent treaty and statutes,[4] has remained the home of the Omaha Indian Tribe.

In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the opposite, Iowa, side of the river, around which the river flowed in an oxbow curve known as Blackbird Bend.[5] Over the next few decades the river changed course several times, sometimes moving east, sometimes west.[6] Since 1927, the river has been west of its 1867 position, leaving most of the Barrett survey area on the Iowa side of the river, separated from the rest of the reservation.

As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Four lawsuits followed the seizure, three in federal court and one in state court. The Federal District Court for the Northern District of Iowa consolidated the three federal actions, severed claims to damages and lands outside the Barrett Survey area, and issued a temporary injunction that permitted the Tribe to continue possession. The court then tried the case without a jury. At trial, the Government and Tribe argued that the river's movement had been avulsive, and therefore the change in location of the river had not affected the boundary of the reservation. Petitioners argued that the river had gradually eroded the reservation lands on the west bank of the river, and that the disputed land on the east bank, in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.[7] Both sides sought to quiet title in their names.

The District Court concluded that state rather than federal law should be the basis of decision. 433 F. Supp. 57 (ND Iowa 1977). The court interpreted the Rules of Decision Act, 28 U. S. C. § 1652, as not requiring the application of federal law in land disputes, even though the United States and an Indian tribe were claimants,[8] unless the Constitution, a treaty, or an Act of Congress specifically supplanted state law. The court found no indication in those sources that federal law was to govern. It then went on to conclude that 25 U. S. C. § 194 was not applicable to the case because it was impossible for the Tribe to make out a prima facie case that it possessed the disputed lands in the past without proving its case on the merits. Thus, § 194 had no significance because it was "inextricably entwined with the merits." 433 F. Supp., at 66.[9]

Applying Nebraska law,[10] which places the burden of proof on the party seeking to quiet title, the court concluded that the key changes in the river had been accretive, and that the east-bank riparians, the petitioners, were thus the owners of the disputed area. 433 F. Supp. 67 (ND Iowa 1977).[11]

[3] The term is commonplace in boundary disputes between riparian States. See, *e. g.*, *Minnesota* v. *Wisconsin*, 252 U. S. 273, 282 (1920):

"The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

[4] Treaty of March 6, 1865, 14 Stat. 667; Act of June 22, 1874, 18 Stat. 146, 170; Act of August 7, 1882, 22 Stat. 341; see also Act of March 3, 1885, 23 Stat. 362, 370, as amended by Act of January 7, 1925, 43 Stat. 726.

[5] There is some dispute over whether the Barrett survey actually marked the reservation boundary because several years had passed since the Tribe began occupying the reservation and the Missouri may have changed its course during that period. See 433 F. Supp. 67, 69, 74 (ND Iowa 1977). This does not appear to be of significance in the case. *Id.*, at 75.

[6] In *Nebraska* v. *Iowa*, 143 U. S. 359 (1892), the Court decided a boundary dispute between the States of Nebraska and Iowa caused by the wanderings of the Missouri. "The fickle Missouri River," however, "refused to be bound by the . . . decree," Erickson, Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927); and in 1943 Nebraska and Iowa entered into a Compact fixing the boundary between the States independent of the river's location. Congress ratified the Compact in the Act of July 12, 1943, ch. 220, 57 Stat. 494. Since the time of the Compact, the Army Corp of Engineers has been largely successful in taming the river. *Nebraska* v. *Iowa*, 406 U. S. 117, 119 (1972).

[7] The District Court stated the common-law rule, 433 F. Supp. 57, 62 (ND Iowa 1977):

"Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm* v. *Stevens*, 128 Neb. 619, 259 N. W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co.* v. *Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong* v. *Olsen*, 63 Neb. 327, 88 N. W. 512 (1901)."

This Court has followed the same principles resolving boundary disputes between States bordering on navigable streams. *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918); *Missouri* v. *Nebraska*, 196 U. S. 23, 34–36 (1904); *Nebraska* v. *Iowa*, 143 U. S., at 360–361, 370.

[8] The District Court relied on *Mason* v. *United States*, 260 U. S. 545 (1923); *Francis* v. *Francis*, 203 U. S. 233 (1906); and *Fontenelle* v. *Omaha Tribe of Nebraska*, 298 F. Supp. 855 (Neb. 1969), aff'd, 430 F. 2d 143 (CA8 1970).

[9] The District Court also suggested that the possessory interest of the Tribe was not of sufficient quality to trigger the burden-shifting contemplated by 25 U. S. C. § 194.

[10] The District Court construed the Court's decision in *Nebraska* v. *Iowa*, 406 U. S. 117 (1972), as requiring the application of Nebraska law with respect to changes in the river that occurred before 1943, the date of the Iowa-Nebraska Compact that permanently fixed the boundary between the States, because the land at issue here was indisputably part of Nebraska before the river changed its course. 433 F. Supp., at 60, and n. 2.

[11] Although the District Court hewed closely to Nebraska case law, it also observed that insofar as the relevant definitions of avulsion and accretion were concerned, there was no significant difference between Iowa and Nebraska law, except that under Iowa law accretion was presumed, which was not the case under Nebraska law. Because Nebraska law would not aid the defendants by a presumption of accretion, the Tribe was favored by the application of Nebraska law. The District Court was also of the view that the federal accretion-avulsion law was not substantially different. As

The Court of Appeals reversed. 575 F. 2d 620 (CA8 1978). It began by ruling that the District Court should have applied federal rather than state law for two distinct reasons. First, the boundary of the reservation was coincidental with an interstate boundary at the time the river moved. Therefore, under *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977), and other cases of this Court, the governing law is federal because

> "The rendering of a decision in a private dispute which would 'press back' an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law." 575 F. 2d, at 628.

Second, the Court of Appeals construed our decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677 (1974), as requiring the application of federal law because the Tribe asserted a right to reservation land based directly on the 1854 Treaty and therefore arising under and protected by federal law.

The Court of Appeals also ruled that the District Court had erred by refusing to apply 25 U. S. C. § 194. Because the Tribe had proved that the 1854 Treaty included the land area within the Barrett survey it had made a sufficient showing of "previous possession or ownership" to invoke the statute and place the burden of proof on petitioners. Adopting the District Court's construction "would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river." 575 F. 2d, at 631.

Reviewing what it perceived to be the federal common law of accretion and avulsion and with no more than passing reference to Nebraska law on the issue, the Court of Appeals concluded that the District Court had based its ruling on a too narrow definition of avulsion.[12] The court then applied the law to the evidence and found that the evidence was in equipoise. Because § 194 placed the burden of proof on the non-Indians, however, the court ruled that judgment must be entered for the Tribe.

We granted separate petitions for certiorari filed by the State of Iowa in No. 78–161 and by the individual petitioners in No. 78–160, but limited to the questions whether 25 U. S. C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases. — U. S. — (1978).[13] We are in partial, but serious, disagreement with the Court of Appeals, and vacate its judgment.

II

Petitioners challenge on several grounds the Court of Appeals' construction and application of § 194 to these cases.[14] First, they argue that by its plain language the section does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. We think the argument is untenable. The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of March 30, 1802, 2 Stat. 139 *et seq.*, which was one of a series of acts originating in 1790 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians.[15] Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729 *et seq.* Section 22 of that Act is now 25 U. S. C. § 194, already set out in this opinion. Although the word "Indian" in the second line of § 22 of the 1834 Act replaced the word "Indians" in the 1822 provision, there is no indication that any change in meaning was intended; and none should be implied at this late date, particularly in light of Title 1, United States Code, § 1, which provides that unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties or things."

Even construed as including the plural, however, it is urged that the word "Indians" does not literally include an Indian tribe, and that it is plain from other provisions of the Act that Congress intended to distinguish between Indian tribes and individual Indians. But as we see it, this proves too much. At the time of the enactment of the predecessors of § 194, Indian land ownership was primarily tribal ownership; aboriginal title, a possessory right, was recognized and was extinguishable only by agreement with the tribes with the consent of the United States. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S., at 669–670. Typically, this was accomplished by treaty between the United States and the tribe, and typically the land reserved or otherwise set aside was held in trust by the United States for the tribe itself. "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *United States* v. *Jim*, 409 U. S. 80, 82 (1972), quoting *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307 (1902). It is clear enough that, when enacted, Congress intended the 1822 and

we shall see, the Court of Appeals differed with the District Court in this respect.

[12] The Court of Appeals relied on two cases, *Veatch* v. *White*, 23 F. 2d 69 (CA9 1927), and *Uhlhorn* v. *U. S. Gypsum Co.*, 366 F. 2d 211 (CA8 1966), cert. denied, 385 U. S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F. 2d, at 637. This definition was broader than the Nebraska rule as understood and applied by the District Court, which the Court of Appeals described as follows: "an avulsion occurs only where a sudden shift in a channel cuts off land 'so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed.'" *Id.*, at 634, quoting 433 F. Supp., at 73. As is evident, the definition employed by the Court of Appeals permits a finding of avulsion even where the river is still largely within its original bed.

[13] In No. 78–161, filed by the State of Iowa, the questions on which certiorari was granted were stated as follows:

"Whether the State of Iowa is 'a white person,' and the Omaha Indian Tribe is 'an Indian' within the meaning of 25 U. S. C. § 194.

. . . . .

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."

In No. 78–160, we granted certiorari on the following questions:

"Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

"Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case."

[14] Of these various arguments, only the single ground relied on by the District Court in refusing to apply § 194 was discussed and rejected by the Court of Appeals. The other grounds for holding § 194 inapplicable to this case were presented by petitioners either in their briefs on the merits before the Court of Appeals or their Petition for Rehearing before that court after it reversed the District Court.

[15] The background, history and development of these laws and acts are explored exhaustively in F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834 (1962). See also F. Cohen 68–75.

1834 provisions to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance given the historical fact that at the time of the enactment virtually all Indian land was tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in the light of the common notions of the day and the assumptions of those who draft them." *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978). Furthermore, " 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' " *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976), quoting *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918).

The second argument, presented in its most acute form by the State of Iowa, is that § 194 applies only where the Indians' antagonist is an individual white person and has no force at all where the adverse claimant is an artificial entity.[16] We cannot accept this broad submission. The word "person" for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals." 1 U. S. C. § 1. And in terms of the protective purposes of the acts of which § 194 and its predecessors were a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual. As we said in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 687 (1978), "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[17] It stands to reason that in re-enacting this provision, first in the Revised Statutes and then in the United States Code, Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals.

It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States* v. *Cooper Corp.*, 312 U. S. 600, 604 (1941); accord, *United States* v. *Mine Workers*, 330 U. S. 258, 275 (1947). Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *United States* v. *Knight*, 14 Pet. 301, 315 (1840). There is nevertheless "no hard and fast rule of exclusion," *United States* v. *Cooper., Corp., supra*, at 604–605; and much depends on the context, the subject matter, legislative history and executive interpretation. The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute. But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . . ." Although this definition was discarded in the Revised Statutes, see R. S. 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.

Nor have we discovered anything since its passage or in connection with the definition of Indian country now contained in the criminal code, 18 U. S. C. § 1151, indicating that Congress intended the word "white person" in § 194 to include any of the original or any of the newly admitted States of the Union. We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 194 when litigating title to the property to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America. It may well be that a State, like other litigants and like the State of Iowa did in this case, will often bear the burden of proof on various issues in litigating the title to real estate. But § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute.

Petitioners also defend the refusal of the District Court to apply § 194 on the grounds that a precondition to applying it is proof of prior possession or title in the Indians and that this involves the merits of the issue on which this case turns—whether the changes in the river were avulsive or accretive. We think the Court of Appeals had the better view of the statute in this regard. Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute. The usual way of describing real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments. There seems to be no question here that the area within the Barrett survey was once riparian land lying on the *west* bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854. This was enough, it seems to us, to bring § 194 into play. Of course, that would not foreclose the State of Iowa from offering sufficient evidence to prove its own title or from prevailing on any affirmative defenses it may have.

Petitioners also assert that even if § 194 is operative and even if the Tribe has made out its prima facie case, only the burden of going forward with the evidence, and not the burden of persuasion, is shifted to the State. Therefore they, the petitioners, should prevail if the evidence is in equipoise. The term "burden of proof" may well be an ambiguous term connoting either the burden of going forward with the evidence, the burden of persuasion or both. But in view of the evident purpose of the statute and its use of the term "presumption" which the "white man" must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

[16] Petitioners cite *United States* v. *Perryman*, 100 U. S. 235 (1880), as support for their position that § 194 must be construed literally to apply only to a "white person," or individual Caucasian. But that case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term "white person" as used in § 16 did not include a Negro. Whether *Perryman* would be followed today is a question we need not decide.

[17] There were two corporate defendants among the parties in the District Court. They filed a separate petition for certiorari, No. 78-162, but no action has yet been taken on it. Under our rules, however, the two corporations are party-respondents in the cases which we have granted. Rule 21 (4).