UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

HANDBOOK

of

FEDERAL INDIAN LAW

WITH REFERENCE TABLES AND INDEX

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First Printing 1941
Second Printing 1942
Third Printing 1942
Fourth Printing 1945

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON : 1945

For sale by the Superintendent of Documents, Washington, D. C. - Price $2.50

to inhabit the valleys and the mountains beyond; hence removal must cease, and the policy abandoned. * * *[104]

To protect Indian funds from fraud, Commissioner Manypenny recommended that—

> * * * All executory contracts of every kind and description, made by Indian tribes or bands with claim agents, attorneys, traders, or other persons, should be declared by law null and void, and an agent, interpreter, or other person, employed in or in any way connected with the Indian service, guilty of participation in transactions of the kind referred to, should be instantly dismissed and expelled from the Indian country; and all such attempts to injure and defraud the Indians, by whomsoever made or participated in, should be penal offences, punishable by fine and imprisonment. We have now penal laws to protect the Indians in the secure and unmolested possession of their lands, and also from demoralization by the introduction of liquor into their country, and the obligation is equally strong to protect them in a similar manner from the wrongs and injuries of such attempts to obtain possession of their funds.[105]

Secretary of the Interior McClelland in 1854, apropos of treaty obligations, reiterates:

> * * * The duty of the government is clear, and justice to the Indians requires that it should be faithfully discharged. Experience shows that much is gained by sacredly observing our plighted faith with these poor creatures, and every principle of justice and humanity prompts to a strict performance of our obligations.[106]

Commissioner Denver, in 1857,[107] tells of the successful extinguishing of title to all lands owned by Indians west of Missouri and Iowa "* * * except such portions as were reserved for their future homes * * *."[108]

Of Indians who have removed to

> * * * large reservations of fertile and desirable land, entirely disproportioned to their wants for occupancy and support, * * *. Their reservations should be restricted so as to contain only sufficient land to afford them a comfortable support by actual cultivation, and should be properly divided and assigned to them, with the obligation to remain upon and cultivate the same.[109]

Commissioner Denver urged discontinuance of the practice of distributing funds due to tribes in per capita payments to individual members. This practice, he thought, tended to break down the authority of the chiefs, and thus

> * * * disorganizes and leaves them without a domestic government * * *. The distribution of the money should be left to the chiefs, so far at least as to enable them to punish the lawless and unruly by withholding it from them * * *.[110]

Commissioner Denver tells of the attempt by the Government to suppress the practice in California of kidnapping Indian children and selling them for servants.[111]

He concludes his report with a plea for a recodification of Indian law:

> * * * I urgently repeat the recommendation of my immediate predecessor, that there be an early and complete revision and codification of all the laws relating to Indian affairs, which, from lapse of time and material changes in the location, condition, and circumstances of the most of the tribes, have become so insufficient and unsuitable as to occasion the greatest embarrassment and difficulty in conducting the business of this branch of the public service.[112]

In 1858, Commissioner Mix estimated the number of Indians to be about 350,000,[113] approximately the same number as it is estimated exists today.[114] He further estimated that about 393 treaties had been signed since the adoption of the Constitution; and that approximately 581,163,188 acres had been acquired through cession at a cost of $49,816,344.[115]

The principle upon which treaty-making with the Indians for land cessions rested was thus stated:

> that the Indian tribes possessed the occupant or usufruct right to the lands they occupied, and that they were entitled to the peaceful enjoyment of that right until they were fairly and justly divested of it.[116]

However, that principle was apparently not adhered to in the Territories of Oregon and Washington.

> * * * strong inducements were held out to our people to emigrate and settle there, without the usual arrangements being made, in advance, for the extinguishment of the title of the Indians who occupied and claimed the lands.[117]

According to Commissioner Mix, past Government policy had been in error in at least three respects: (1) Removal from place to place prevented the acquiring of "* * * settled habits and a knowledge of and taste for civilized pursuits * * *";[118] (2) assignment of too large a country to be held in common resulted in improper use and failure to acquire "* * * a knowledge of separate and individual property * * *";[119] (3) annuities resulted in iddolence among Indians and fraudulent practices by whites.[120]

> The policy of concentrating the Indians on small reservations of land, and of sustaining them there for a limited period, until they can be induced to make the necessary exertions to support themselves, was commenced in 1853, with those in California. It is, in fact, the only course compatible with the obligations of justice and humanity.[121]

The military appears to have been used in the vicinity of reservations "to prevent the intrusion of improper persons upon them [the Indians], to afford protection to the agents, and to aid in controlling the Indians and keeping them within the limits assigned to them."[122]

In 1859, Secretary of the Interior Thompson reports progress in the shift of Government policy from that of removal to that of fixed reservations.[123]

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[104] *Ibid.*, p. 17.

[105] *Ibid.*, pp. 21–22. See also extract from Report of Secretary of Interior, 1862, p. 13, in Rep. Comm. Ind. Aff., 1862.

> All contracts with them should be prohibited, and all promises or obligations made by them should be declared void.

Legislation along the lines urged was enacted in 1871. See Chapter 14, sec. 5.

[106] Extract from Annual Report of the Secretary of Interior, 1854, p. 41, in Rep. Comm. of Ind. Aff., 1854.

[107] Rep. Comm. of Ind. Aff., 1857.

[108] *Ibid.*, p. 3. See Commissioner Manypenny's Report for 1853, *supra*, pp. 249, 250 for opposition to such a policy.

[109] *Ibid.*, p. 4.

[110] *Ibid.*, p. 7.

[111] *Ibid.*, p. 10.

[112] *Ibid.*, p. 12.

[113] Rep. of Comm. of Ind. Aff., 1858, p. 1.

[114] See Chapter 1, sec. 2, fn. 4.

[115] Rep. Comm. of Ind. Aff., 1858, p. 1.

[116] *Ibid.*, p. 6.

[117] *Ibid.*, p. 7.

[118] *Ibid.*, p. 7. He notes the difference in development between the northern tribes and those of the South who were permitted to remain for long periods in their original locations (pp. 6–7).

[119] *Ibid.*, p. 6.

[120] *Ibid.*, p. 6.

[121] *Ibid.*, p. 9.

[122] *Ibid.*, p. 10.

[123] See Commissioner Manypenny's recommendation for such a shift in 1854, *supra*.

B. TRIBAL FUNDS

The power of Congress over tribal funds is the same as its power over tribal lands, and is, historically speaking, a result of the latter power, since tribal funds arise principally from the use and disposition of tribal lands. The extent of congressional power has been expressed by the Attorney General as follows: [85]

> Now, as these royalties are tribal funds, it can not be seriously contended that Congress had not power to provide for their disbursement for such purposes as it might deem for the best interest of the tribe. That power resides in the Government as the guardian of the Indians, and the authority of the United States as such guardian is not to be narrowly defined, but on the contrary is plenary.
>
> Examples of the exercise of such power over the tribal property of Indians, and decisions sustaining it, are found in many of the adjudicated cases, among them *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Gritts* v. *Fisher*, 224 U. S. 640; *Sizemore* v. *Brady*, 235 U. S. 441; *Chase* v. *United States*, decided April 11, 1921. (P. 63.)

The congressional control over tribal funds was defined by Justice Van Devanter in the case of *Sizemore* v. *Brady*.[86]

> As in the case of lands, Congress cannot divert tribal funds from tribal purposes in the absence of Indian consent or corresponding benefit without being liable, when suit is brought, for the amount diverted. Thus, there has been occasion, not infrequently, for judicial analysis of the manner of disposition of tribal funds. On the whole the tendency of the Court of Claims has been to uphold expenditures authorized by Congress as made for tribal purposes.[87]

C. INDIVIDUAL LANDS

The power of Congress over individual lands, while less sweeping than its power over tribal lands, is clearly broad enough to cover supervision of the alienation of individual lands.[88] In fact the exercise of congressional power over individual lands has been largely directed toward the release, extension, or reimposition of restrictions surrounding their alienation, depending on whether the policy of conserving or of opening up Indian lands was dominant in Congress.

As "an incident to guardianship" [89] Congress not only has the power to extend,[90] modify, or remove existing restrictions on the alienation of such lands [91] but while the Indian is still the ward of the nation it may reimpose restrictions on property already freed from restrictions or delegate such power to an executive officer.[92]

This power includes permitting alienation upon such terms as Congress or the federal officer delegated with the power deems advisable from the standpoint of the protection of the Indians.[93] Such restrictions must be expressed and are not implied merely because the owner of land is an Indian,[94] nor can such restrictions be made retroactive so as to invalidate a conveyance made by an Indian before the restriction was imposed.[95]

Congress may lift the restriction on alienation of allotments to mixed-blood Indians and continue the restrictions on full-blood Indians, until the Secretary of the Interior is satisfied that such Indians are competent to handle their own affairs.[96] In deciding this question the Supreme Court said:

> * * * it is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. *United States* v. *Nice*, 241 U. S. 591, 598, and cases cited. (Pp. 459–460.)

The restrictions on alienation of land express a public policy designed to protect improvident people.[97] Hence under the statutes, despite the good faith or motives of a grantee of land conveyed in violation of the restrictions,[98] the conveyance is void.[99]

As in the case of private property generally, Congress cannot deprive an Indian of his land or any interest therein without due process of law or take such property for public purposes without just compensation. An outstanding decision on this subject is

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[85] 33 Op. A. G. 60 (1921). Also see *Chickasaw Nation* v. *United States*, 87 C. Cls. 91 (1938), cert. den. 307 U. S. 646. Congress may appropriate tribal funds for the civilization and self-support of the Indian tribe. *Lane* v. *Morrison*, 246 U. S. 214 (1918). See Chapter 12, sec. 2.

[86] 235 U. S. 441 (1914). See sec. 6, *infra*.

The power of Congress over Osage tribal funds is upheld in *Ne-kah-wah-she-tun-kah* v. *Fall*, 290 Fed. 303 (App. D. C. 1923), app. dism. 266 U. S. 595 (1925).

[87] See *Gritts* v. *Fisher*, 224 U. S. 640 (1912).

[88] Congress has not exerted authority over individual lands not in a trust or restricted category except in so far as to reimpose restrictions and restore them to the class of lands under its supervision.

[89] *La Motte* v. *United States*, 254 U. S. 570, 575 (1921).

[90] *Tiger* v. *Western Inv. Co.*, 221 U. S. 286 (1911); *Heckman* v. *United States*, 224 U. S. 413 (1912). Also see *United States* v. *Jackson*, 280 U. S. 183, 191 (1930), involving extension of trust period of homestead patent under Act of July 4, 1884, 23 Stat. 76, 96, on the ground that the Indians possessed no vested right until a fee patent was issued; and *United States* v. *Pelican*, 232 U. S. 442, 451 (1914) involving congressional retention of trusteeship of land thrown open to settlement.

For a list of reservations in which the trust or restricted period was extended, see 25 C. F. R., appendix to Chapter 1, pp. 480–483.

[91] *Goat* v. *United States*, 224 U. S. 458 (1912); *Deming Inv. Co.* v. *United States*, 224 U. S. 471 (1912); *Jones* v. *Prairie Oil Co.*, 273 U. S. 195 (1927).

[92] *Brader* v. *James*, 246 U. S. 88 (1918), cited with approval in *McCurdy* v. *United States*, 246 U. S. 263, 273 (1918).

[93] *Mullen* v. *United States*, 224 U. S. 448 (1912). See *United States* v. *Noble*, 237 U. S. 74 (1915); *Sunderland* v. *United States*, 266 U. S. 226 (1924).

[94] *Doe* v. *Wilson*, 23 How. 457 (1859).

[95] *Wilson* v. *Wall*, 6 Wall. 83 (1867).

[96] *United States* v. *Waller*, 243 U. S. 452 (1917). From time to time Congress has by statute empowered the Secretary to remove restrictions or issue certificates of competency to Indians deemed capable of managing their own affairs. See Chapter 11, sec. 4.

[97] * * * In adopting the restrictions, Congress was not imposing restraints on a class of persons who were *sui juris*, but on Indians who were being conducted from a state of dependent wardship to one of full emancipation and needed to be safeguarded against their own improvidence during the period of transition. The purpose of the restrictions was to give the needed protection * * *. (Pp. 464–465.) *Smith* v. *McCullough*, 270 U. S. 456 (1926).

[98] *United States* v. *Brown*, 8 F. 2d 564 (C. C. A. 8, 1925), cert. den., 270 U. S. 644 (1926).

[99] *Heckman* v. *United States*, 224 U. S. 413 (1912); *Goat* v. *United States*, 224 U. S. 458 (1912); *Starr* v. *Long Jim*, 227 U. S. 613 (1913); *Monson* v. *Simonson*, 231 U. S. 341 (1913), holding that a deed by an Indian of an allotment subject to restrictions against alienation was absolutely void if made before final patent, even if made after passage of an act of Congress permitting the Secretary of the Interior to issue such patent; and that the unrestricted title subsequently acquired by the allottee under the patent does not inure to the grantee. Also see *Miller* v. *McClain*, 249 U. S. 308 (1919); *United States* v. *Reynolds*, 250 U. S. 104 (1919); and *Smith* v. *Stevens*, 77 U. S. 321, 326 (1870), discussing the policy behind restrictions on sale of land in Treaty between United States and Kansas Indians of June 3, 1825, 7 Stat. 244, 245, and the Act of May 26, 1860, 12 Stat. 21. Also see Chapter 11, sec. 4H.

Choate v. *Trapp*,[100] which held that exemption from taxation established by Congress created in the Indian landholder a vested right not subject to impairment by later legislative act.[101]

The Supreme Court distinguished between the exemption from taxation and the restriction on alienation:[102]

> But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. *Kansas Indians*, 5 Wall. 737, 756; *United States* v. *Rickert*, 188 U. S. 432. (P. 673.)

As part of its supervision of alienation of individual lands, Congress has provided for the disposition and inheritance, by descent or devise, of trust and restricted lands,[103] and the exercise of this power has been sustained.[104] Congress has also vested jurisdiction in the county courts over probate proceedings of such property.[105]

D. INDIVIDUAL FUNDS

The power of Congress over individual funds is an outgrowth of its control over restricted lands and the same general principles are applicable to both.[106]

[100] 224 U. S. 665 (1912). Also see *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8, 1917); Chapter 13, secs. 1, 5, 10; 49 L. D. 348, 352 (1922); Op. Sol. I. D., M. 13864, December 24, 1924; Op. Sol. I. D., M. 25737, March 3, 1930.

[101] The Supreme Court said:

> There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *In re Heff*, 197 U. S. 488, 504; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Smith* v. *Goodell*, 20 Johns. (N. Y.) 188; *Lowry* v. *Weaver*, 4 McLean, 82; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Arkansas, 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 175 U. S. 1. * * *
>
> Nothing that was said in *Tiger* v. *Western Investment Co.*, 221 U. S. 286, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that "Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation," it was said that "Incompetent persons, though citizens, may not have the full right to control their property," and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.
>
> But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment. (Pp. 677, 678.)

A recognition of this restriction on Federal power appears in Article XI of the Treaty of April 1, 1850, with the Wyandots, 9 Stat. 987, 992, which provided:

> All former treaties between the United States and the Wyandot nation of Indians are abrogated and declared null and void by this treaty—except such provisions as may have been made for the benefit of private individuals of said nation, by grants of reservations of lands, or otherwise, which are considered as *vested* rights, and not to be affected by anything contained in this treaty.

[102] *Choate* v. *Trapp*, 224 U. S. 665, 673 (1912). Apparently the removal of the restriction against alienation does not vest any rights in the Indian landholder. See *Brader* v. *James*, 246 U. S. 88 (1918).

Congress may assent to a state tax levied on the production of oil and gas under a lease of tribal lands. *British-American Co.* v. *Board*, 299 U. S. 159 (1936).

[103] Also see Chapter 11, sec. 6.

[104] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903); *Brader* v. *James*, 246 U. S. 88 (1918). See Chapter 10, sec. 10; Chapter 11, sec. 6.

[105] On jurisdiction of county courts over the Five Civilized Tribes, see Chapter 23, sec. 11C, and Act of May 27, 1908, 35 Stat. 312, amended by Act of April 10, 1926, 44 Stat. 239.

[106] For a discussion of congressional control of individual funds see Chapter 10, sec. 2.

SECTION 6. CONGRESSIONAL POWER—MEMBERSHIP

The Indian tribes have original power to determine their own membership.[107] Congress has the power, however, to supersede that determination when necessary for the administration of tribal property, particularly its distribution among the members of the tribe.[108]

The United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property.[109] The assumption of power on the part of the Federal Government to distribute tribal funds and land among the individual members of the tribe required the preparation of payment or census rolls. Several treaties[110] and statutes[111] authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees. Rarely (considering the multitude of individual grievances presented annually by individual Indians or alleged Indians) has Congress specifically provided for additions to tribal rolls in individual cases.[112]

In addition to its ultimate authority to determine tribal membership, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may

[107] See Chapter 7, sec. 4.

[108] The Circuit Court of Appeals in the case of *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8, 1901), said:

> * * * It is the settled rule of the judicial department of the government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. *U. S.* v. *Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *U. S.* v. *Earl* (C. C.) 17 Fed. 75, 78. (P. 951.)

[109] *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899). See *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, 307 (1902).

[110] See, for example, Treaty of July 8, 1817, with the Cherokees, Art. 3, 7 Stat. 156; Treaty of November 24, 1848, with the Stockbridge Tribe, Art. 2, 9 Stat. 955; Treaty of November 15, 1861, with the Pottawatomie Nation, Art. 2, 12 Stat. 1191; Treaty of June 24, 1862, with the Ottawa Indians, Art. 8, 12 Stat. 1237; Treaty of June 28, 1862, with the Kickapoo Indians, Art. 2, 13 Stat. 623; Treaty of October 14, 1865, with the Cheyenne and Arrapahoe Tribes, Art. 7, 14 Stat. 703.

The general rule is that "in the absence of [statutory] provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendible." *Wilbur* v. *United States*, 281 U. S. 206, 216 (1930); also see *Halbert* v. *United States*, 283 U. S. 753, 762, 763 (1931). For a fuller discussion, see Chapter 9, sec. 3; Chapter 7, sec. 4.

[111] See, for example, Act of March 3, 1873, sec. 4, 17 Stat. 631 (Miamie); Act of March 3, 1881, sec. 4, 21 Stat. 414, 433 (Miami); Act of July 1, 1902, sec. 1, 32 Stat. 636 (Kansas); Act of June 4, 1920, 41 Stat. 751 (Crow); Act of May 19, 1924, 43 Stat. 132 (Lac du Flambeau band of Chippewas). Also see *Campbell* v. *Wadsworth*, 248 U. S. 169 (1918).

[112] See, for example, Act of May 30, 1896, 29 Stat. 736 (a Sac and Fox woman); Joint Resolution of October 20, 1914, 38 Stat. 780 (Five Civilized Tribes); Act of May 31, 1924, c. 215, 43 Stat. 246 (Flathead); discussed in Op. Sol. I. D., M.14233, April 24, 1925; also see *Gritts* v. *Fisher*, 224 U. S. 640, 648 (1912).

Where statutory authority for the issuance of a right-of-way exists, it has been administratively held that such authority is not repealed by section 4 of the Act of June 18, 1934.[205] In thus construing the Act of June 18, 1934, the Solicitor for the Interior Department declared:[206]

> * * * The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe" and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Although the grant of an easement is held to be outside the prohibition of section 4 of the Act of June 18, 1934, it would appear that section 16 of the act[207] requires the consent of an organized tribe to any grant of right-of-way which the Secretary is authorized to make.[208] Tribal consent is likewise required where the Secretary of the Interior seeks to set aside tribal lands for reservoir purposes for an irrigation project.[209]

> * * * It is true that the United States in its sovereign capacity may condemn tribal land for certain purposes and may even appropriate tribal land by act of Congress subject to constitutional requirements of compensation. But the rights and powers with respect to tribal property granted by the Constitution and Charter of the Confederated Salish and Kootenai Tribes are effective against officers of the United States not acting under direct mandate of Congress. Indeed, unless officers of the Department can be restrained by the Tribe from disposing of tribal property, all meaning has vanished from the provision in section 16 of the Indian Reorganization Act granting to an organized tribe the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." The only persons against whom this provision can be directed are officers of the United States. Private individuals never have had the power to sell tribal land or to dispose of tribal assets. If then * * * the restrictions contained in the above-quoted provision do not run against the United States, they are meaningless and the constitutional provisions enacted in accordance therewith are a false promise.

[205] 48 Stat. 984, 985, 25 U. S. C. 464.
[206] Memo. Sol. I. D., September 2, 1936.
[207] 48 Stat. 986, 25 U. S. C. 476.
[208] See 25 C. F. R. 256.83.
[209] Memo. Sol. I. D., July 8, 1936. And see 25 C. F. R. 256.44.

SECTION 10. ADMINISTRATIVE POWER—TRIBAL FUNDS [210]

In defining the scope of federal administrative power over tribal funds it is important to bear in mind certain distinctions between various classes of funds, all of which are, in some sense of the word, tribal.

Funds which an Indian tribe has derived from its own members or from third parties without the interposition of the Federal Government, as where tribal authorities hold a fair or dance and charge admission, are, in a very real sense, "tribal," yet it has never been held that federal administrative authorities have any control over such funds.[211]

A second class of funds which may be called "tribal" comprises those funds held in the treasury of a tribe which has become incorporated under section 17 of the Act of June 18, 1934,[212] or organized under section 16 of that act.[213] In both cases the scope of departmental power with respect to such funds is marked out by the provisions of tribal constitution or charter. Typically, departmental review is required where the financial transactions exceed a fixed level of magnitude or importance, but not in lesser matters. In the case of incorporated tribes, such departmental supervisory powers are generally temporary.[214]

A third class of funds consists of moneys held in the Treasury of the United States in trust for an Indian tribe. It is this class of funds which is customarily referred to under the phrase "tribal funds." These funds arise from two sources, in general:

1. Payments promised by the Federal Government to the tribe for lands ceded or other valuable consideration,[215] usually arising out of a treaty, and
2. Payments made to federal officials by lessees, land purchasers, or other private parties in exchange for some benefit, generally tribal land or interests therein.[216]

In view of the fact that the land itself was subject to a considerable measure of control, it was natural to find a similar control placed over the funds into which tribal lands were transmuted. Congress has, in general, reserved complete power over the disposition of these funds, requiring that each expenditure of such funds be made pursuant to an appropriation act, although this strict rule has been relaxed for certain favored purposes.[217] Thus it has developed that administrative authority for any disbursement of "tribal funds," in the strict sense, must be derived from the language of some annual appropriation act or from those statutes which are, in effect, permanent appropriations of tribal funds for specified purposes.[218]

[210] The Act of April 1, 1880, c. 41, 21 Stat. 70, provided:

> That the Secretary of the Interior be, and be is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.

Previous to the enactment of this law, the Secretary of the Interior invested tribal funds in various kinds of bonds, including state bonds, some of which were defaulted.

[211] It has been suggested that the Federal Government might bring suit on behalf of an Indian to insure a fair distribution of such funds, but there are no decisions on this point. See Memo. Sol. I. D., November 18, 1936 (Palm Springs).
[212] See Chapter 15, secs. 23 and 24.
[213] See Chapter 15, sec. 23.
[214] *Ibid.*, secs. 23 and 24.
[215] See Chapter 1, sec. 1; Chapter 2, sec. 2; Chapter 3, sec. 3C(3); Chapter 15, sec. 23. The payment of annuities and distribution of goods is a ministerial duty, enforceable by mandamus, if the Secretary is arbitrary or capricious. *Work* v. *United States*, 18 F. 2d 820 (App. D. C. 1927). *Cf. United States ex rel. Coburn* v. *Work*, 18 F. 2d 822 (App. D. C. 1927); *United States ex rel. Detling* v. *Work*, 18 F. 2d 822 (App. D. C. 1927).
[216] See Chapter 15, sec. 23.
[217] *Ibid.*
[218] The Act of May 18, 1916, sec. 27, 39 Stat. 123, 158, 159, requires specific congressional appropriation for expenditure of tribal funds except as follows:

> * * * Equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are hereby continued in full force and effect: * * *

See Chapter 15, sec. 23. Provisions relating to the deposit or investment of funds are numerous. For example, the Secretary of the Interior is authorized to "invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate

Among the most important of the permanent authorizations for the disbursement of tribal funds are the various statutes providing for the division and apportionment of tribal funds among the members of the tribe.[220]

While any administrative control over these funds must be based on statutory authority, it is not necessary, nor is it indeed possible, that every detail of the expenditure shall be expressly covered by statute.[220]

The Court of Claims in the case of *Creek Nation* v. *United States* [221] said:

> * * * The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined. The contention, however, that the Secretary of the Interior could legally make only such disbursements as were expressly authorized by Congress cannot be conceded. The authorities cited in plaintiff's brief in support of this contention, when considered in the light of the precise questions presented, do not sustain it. The opinion of Attorney General Mitchell of October 5, 1929 (36 Op. Attys. Gen. 98–100), in fact, refutes the contention, and in effect lays down the rule that the authority of the Secretary of the Interior over Indian property may arise from the necessary implication as well as from the express provisions of a statute. We think this is the correct rule and will apply it in determining whether the Secretary of the Interior was authorized to make the payments in question. The authority of the Secretary of the Interior to make the payments, or his lack of authority to make them, must be found in the treaties between the United States and the Creek Nation, and the various acts of Congress dealing with Creek tribal affairs. (P. 485.)

Quite apart from the necessity of finding some statutory source for authority to expend funds held in the United States Treasury in trust for an Indian tribe, there are certain positive statutory limitations upon the ways in which such funds may be disbursed. These statutes, which are elsewhere listed,[222] limit the administrative authority derived from appropriation acts construed in conjunction with section 17 of the Act of June 30, 1834,[223] which gave the President power to "prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs, and for the settlement of the accounts of the Indian department."

Perhaps the most important of these statutory limitations in effect today is that imposed by section 16 of the Act of June 18, 1934,[224] which gives an organized tribe the right to prevent any disposition of its assets without the consent of the proper officers of the tribe. This includes the right to prevent disbursements of tribal funds by departmental officials, where the tribe has not consented to such disbursements. Unless an act of Congress authorizing disbursements of tribal funds expressly repeals relevant provisions of the Indian Reorganization Act, such appropriation legislation does not nullify the power of the tribe to prevent such expenditure.[225]

There is a fourth category of funds which may be called "tribal funds" but which are subject neither to the uncontrolled tribal power pertaining to the first class of funds discussed; to the defined tribal power of the second class, nor to the detailed congressional control pertaining to the third class. **This fourth category includes funds which have accrued to administrative officials as a result of various Indian activities not specially recognized or regulated by act of Congress.**

The Act of March 3, 1883,[226] as amended, provides:

> The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

The Comptroller General in a report on Indian funds dated February 28, 1929,[227] stated:

> * * * The absolute control and almost indiscriminate use of these funds, through authority delegated to the several Indian agents by the Commissioner of Indian

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of interest than 5 per centum per annum." (25 U. S. C. 158. R. S. § 2096, derived from Act of June 14, 1836, 5 Stat. 36, 47, as amended by Act of January 9, 1837, sec. 4, 5 Stat. 135.)

There are many special statutes relating to the disposition of tribal funds. For example, the Act of June 20, 1936, 49 Stat. 1543, provides:

> That tribal funds now on deposit or later placed to the credit of the Crow Tribe of Indians, Montana, may be used for per capita payments, or such other purposes as may be designated by the tribal council and approved by the Secretary of the Interior. * * *

The Comptroller General has differentiated between two types of tribal funds:

> There are several classes of *trust funds* provided for by law, the moneys in which are held in trust for certain beneficiaries specified therein. The following may serve as examples:
>
> * * * * *
>
> (b) Section 7 of the act of January 14, 1889 (25 Stat., 645), provides that the net proceeds of sales of lands ceded to the United States by the Chippewa Indians shall be placed in the Treasury to the credit of said Indians as a permanent fund, which shall draw interest at the rate of 5 per centum per annum, principal and interest to be expended for the benefit of said Indians.
>
> (c) Section 5 of the act of June 15, 1880 (21 Stat., 204), in consideration of lands ceded to the United States, provides as follows:
>
> "That the Secretary of the Treasury shall, out of any moneys in the Treasury not otherwise appropriated, set apart, and hold as a perpetual trust-fund for said Ute Indians, an amount of money sufficient at four per centum to produce annually fifty thousand dollars, which interest shall be paid to them per capita in cash, annually. * * *"
>
> The moneys in the *general fund* and also those in *special funds* are available for public expenditures. There is, however, an important distinction in these two classes of funds. Moneys in the *general fund* can only be withdrawn from the Treasury in pursuance of an appropriation made by law; but moneys in *special funds*, having been dedicated by Congress for expenditure for specified objects before they were covered into the Treasury, in which they have been placed for safe-keeping only, are subject to withdrawal from the Treasury for expenditure for those objects without an appropriation (13 Comp. Dec. 219, 700). It is true that in some instances, as in that of the *special fund* called the "reclamation fund" (3, *supra*), Congress has used the term "appropriation" in constituting certain moneys to be collected *special funds*; but as the term is so applied to the moneys before they are collected it is obvious that the term is so used in a general sense only, for which the term "dedicated" appears to be more appropriate.
>
> Moneys in *trust funds* are not properly available for expenditures of the Government. They are payable to or for the use of the beneficiaries only. The beneficiaries may be either a single person or a class of persons. In the three classes of *trust funds* given above, the trust moneys in the first class (*a*) were received directly from the donors; those in the second class (*b*) were collected as revenues of the United States charged with the trust; those in the third class (*c*) were a grant of moneys in the *general fund* of the Treasury in pursuance of a treaty obligation. (14 Decisions, Comptroller Treasury, 361, 365–366 (1907).)

[220] These statutes are discussed in Chapter 9, sec. 6; Chapter 10, sec. 5; Chapter 15, sec. 23.

[220] Act of May 18, 1916, sec. 27, 39 Stat. 123, 158, requires with a few exceptions specific congressional appropriation for tribal expenditures of tribal moneys. The Act of May 25, 1918, secs. 27 and 28, 40 Stat. 561, authorizes the Secretary to invest restricted funds, tribal or individual, in United States Government bonds. Also see Chapter 15, sec. 22F.

[221] 78 C. Cls. 474 (1933). On the lack of power of the Secretary to restore to the Creek orphan fund the funds erroneously expended for general benefit of tribe, see 16 Op. A. G. 31 (1878).

[222] See Chapter 9, sec. 6; Chapter 10, sec. 5; Chapter 15, sec. 23.

[223] 4 Stat. 735, 738, 25 U. S. C. 9, construed to cover disbursement of tribal funds in 5 Op. A. G. 36 (1848).

[224] 48 Stat. 984.

[225] Memo. Sol. I. D., October 5, 1936.

[226] 22 Stat. 582, 590; amended Act of March 2, 1887, 24 Stat. 449, 463; Act of May 17, 1926, sec. 2, 44 Stat. 560; Act of May 29, 1928, sec. 68, 45 Stat. 986, 991, 25 U. S. C. 155.

[227] Sen. Doc. 263, 70th Cong., 2d sess., 1928–29. For a discussion see American Indian Life, Bull. No. 14 (May 1929), American Defense Association, Inc., p. 19.

Affairs pursuant to section 463, Revised Statutes, is apparently causing complaint on the part of groups of Indians. (P. 40.)

The report also contained some evidence justifying the discontent of the Indians.

> * * * "Indian moneys, proceeds of labor," were being used for such purposes as the purchase of adding machines and office equipment, furniture, rugs, draperies, etc., for employees' quarters, papering and painting the superintendent's house, and the purchase of automobiles for the field units. (P. 40.)[229]

The Comptroller General concluded that—

> * * * This condition has through the years of practice brought about a very broad interpretation of what constitutes "the benefit" of the Indian. (P. 39.)[229]

The Act of June 13, 1930,[230] provides:

> SEC. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund 'Indian Money, Proceeds of Labor,' shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.
>
> SEC. 3. The amount held in any tribal fund account which, in the judgment of the Secretary of the Interior, is not required for the purpose for which the fund was created, shall be covered into the surplus fund of the Treasury; and so much thereof as is found to be necessary for such purpose may at any time thereafter be restored to the account on books of the Treasury without appropriation by Congress.

The extent to which funds which are still called "I. M. P. L." are subject to the statutory limitations applicable to tribal funds in the strict sense is an intricate problem upon which no opinion will be here ventured.[231]

[228] Sen. Doc. 263, *op. cit.*

[229] *Ibid.*

[230] C. 483, 46 Stat. 584. There are 300 tribal "funds of principal" held in trust by the United States in the Treasury (Department of the Treasury, Combined Statement of Receipts and Expenditures, Balances, etc., of the United States for Fiscal Year ended June 30, 1939, pp. 417–427), and 266 interest accounts, which are classified by the Treasury as general funds (*Ibid.*, pp. 260–269). The Department of the Interior breaks down many of the principal funds into subordinate classifications.

[231] See Chapter 15, sec. 23A.

SECTION 11. ADMINISTRATIVE POWER—INDIVIDUAL LANDS

Administrative power over individual Indian lands is of particular importance at five points:

(*a*) Approval of allotments,
(*b*) Release of restrictions,
(*c*) Probate of estates,
(*d*) Issuance of rights-of-way,
(*e*) Leasing.

A. APPROVAL OF ALLOTMENTS

The statutes and treaties which confer upon individual Indians rights to allotments are elsewhere discussed,[232] as is the legislation governing jurisdiction over suits for allotments.[233] Within the fabric of rights and remedies thus defined there is a certain scope of administrative discretion[234] which is described in a recent ruling of the Solicitor for the Interior Department in these terms:[235]

> * * * The Secretary may for good reason refuse to approve an allotment selection, but he may not cancel his approval of an allotment except to correct error or to relieve fraud. Cf. *Corneleus* v. *Kessel* (128 U. S. 456) (public land entry). It is very doubtful whether the Secretary would be privileged to return allotment selections to tribal ownership simply on the ground that the Wheeler-Howard Act possibly forbids the trust patenting of such selections.
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> * * * * * *
>
> (2) Where the Secretary has approved an allotment, the ministerial duty arises to issue a patent. With approval his discretion is ended except, of course, for such reconsideration of his approval as he may find necessary (24 L. D. 264). Since only the routine matter of issuing a patent remains, the allottee after his allotment is approved is considered as having a vested right to the allotment as against the Government. Raymond Bear Hill (42 L. D. 689 (1929)). (*Cf.* Where a certificate of approval has issued as in the Five Civilized Tribe cases, *Ballinger* v. *Frost* (216 U. S. 240); and where right to a homestead is involved, *Stark* v. *Starre* (6 Wall. 402).) And then the allottee may bring mandamus to obtain the patent. See *Vachon* v. *Nichols-Chisolm Lumber Co.* (126 Minn. 303, 148 N. W. 288, 290 (1914).) *Cf. Lane* v. *Hoglund* (244 U. S. 174); *Butterworth* v. *United States* (112 U. S. 50); *Barney* v. *Dolph* (97 U. S. 652, 656).
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> * * * * * *
>
> (3) Where an allotment has not been approved, on the other hand, approval and the issuance of a patent cannot be compelled by mandamus. *West* v. *Hitchcock* (205 U. S. 80); *United States* v. *Hitchcock* (190 U. S. 316). But it is recognized that an allottee acquires rights in land with some of the incidents of ownership when the allotting agents have set apart allotments and he has made his selection. Until that time an Indian eligible for allotment has only a floating right which is personal to himself and dies with him. *La Roque* v. *United States* (239 U. S. 62). See Philomme Smith (24 L. D. 323, 327). The owner of an allotment selection, even before its approval, has an inheritable interest (*United States* v. *Chase* (245 U. S. 89); *Smith* v. *Bonifer* (166 Fed. 846) (C. C. A. 9th, 1909)); which will be protected from the outside world (*Smith* v. *Bonifer*, *supra*); and which he can transfer within limits (*Henkel* v. *United States*, *supra*; *United States* v. *Chase*, *supra*); and which is sufficient to confer on him the privileges of State citizenship as granted to all "allottees" by the act of 1887 (*State* v. *Norris*, *supra*). Moreover, where the Government has issued an erroneous patent for the allotment selections, the owner of such selection will be protected in his right against the adverse interests possessing the patent (*Hy-Yu-Tse-Mil-Kin* v. *Smith* (194 U. S. 401); *Smith* v. *Bonifer* (132 Fed. 889 (C. C. Ore. 1904), 166 Fed. 846 (C. C. A. 9th, 1909)), and against the Government itself. *Conway* v.

[232] See Chapter 11, sec. 2.

[233] See Chapter 19, sec. 2.

[234] The Act of March 3, 1885, sec. 6, 23 Stat. 340 (Cayuse and others) which authorizes the Secretary to determine all disputes and questions arising between Indians regarding their allotments, exemplifies one of the many administrative powers over allotments. The Supreme Court in *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401 (1904) said that if two Indians claim the same land, the allotment should be "made in favor of the one whose priority of selection and residence and whose improvements on the land equitably entitled such person to the land." (P. 414.)

The Court in the case of *La Roque* v. *United States*, 239 U. S. 62 (1915) said:

> * * * The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the allotting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. (P. 64.)

On the scope of discretion of the Secretary of the Interior in allotting lands, see *Chase, Jr.*, v. *United States*, 256 U. S. 1 (1921).

[235] Op. Sol., I. D., M. 28086, July 17, 1935. And see Memo. Sol., I. D., September 17, 1934.

SECTION 13. ADMINISTRATIVE POWER—MEMBERSHIP

A. AUTHORITY OVER ENROLLMENT

At various times Congress has delegated to the Department of the Interior much of its sweeping power over the determination of tribal membership.[211] During the periods when the federal policy was designed to break up the tribal organization, this power was one of the most important administrative powers, since the sharing in tribal property usually depended upon being placed upon a roll prepared by the Department or subject to its approval. At present, under the policy of encouraging tribal organization, membership problems are not usually as crucial as formerly.[212] However, they may be important for other purposes, such as determining the right to vote in a tribal election. The most important limitation on the Secretary's power[213] when the tribe is still in existence is the principle that in the absence of express congressional legislation to the contrary an Indian tribe has complete authority to determine all questions of its own membership.[214]

The power of the Secretary to determine tribal membership[215] for the purpose of segregating the tribal funds was granted by section 163 of title 25 of the United States Code,[216] which reads as follows:

> The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds * * *, and shall be conclusive both as to ages and quantum of Indian blood: *Provided*, That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin.

Treaties often provide for the payment of money to an Indian of a tribe whose membership is ascertained by an administrative authority which shall examine and determine questions of fact concerning the identity of the members.[217] Statutes also impose such duty upon the Secretary[218] or a *quasi* judicial tribunal,[219] whose determinations are subject to the approval of the Secretary of the Interior. Such enrollments are presumptively correct,[220] and unless impeached by very clear evidence of fraud, mistake, or arbitrary action they are conclusive upon the courts.[221]

B. REMEDIES

Where the determination of membership in a tribe is left to the Secretary of the Interior, his decision is final and cannot be controlled by mandamus unless his act is arbitrary and in excess of the authority conferred upon him by Congress.[222]

It has also been held that the duty imposed upon him to restore names to the tribal roll is not a mere ministerial act, but calls for the determination of issues of fact and interpretations of law, and that his decisions are not ordinarily subject to review or controlled by mandamus, even though he is wrong or may change his mind within the period allowed.[223]

For example, the Secretary of the Interior was empowered by section 2 of the Act of April 26, 1906,[224] to complete the rolls of the Creek Nation, and his jurisdiction to approve the enrollment ceased on the last day set by the statute. In *United States ex rel. Johnson* v. *Payne*,[225] the Secretary had approved the decision of the Commissioner of the Five Civilized Tribes and then reversed it and ordered the name of the petitioner stricken from the rolls. The Supreme Court said:

> * * * While the case was before him he was free to change his mind, and he might do so none the less that he had stated an opinion in favor of one side or the other. He did not lose his power to do the conclusive act, ordering and approving an enrollment, *Garfield* v. *Goldsby*, 211 U. S. 249, until the act was done. *New Orleans* v. *Paine*, 147 U. S. 261, 266. *Kirk* v. *Olson*, 245 U. S. 225, 228. The petitioners' names never were on the rolls. The Secretary was the final judge whether they should be, and they cannot be ordered to be put on now, upon a suggestion that

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[211] See Chapter 19, sec. 4.

[212] See Chapter 10, sec. 4.

[213] The limitations on administrative power over membership are indicated by an opinion of the Circuit Court of Appeals in *Ex parte Pero*, 99 F. 2d 28 (C. C. A. 7, 1938):

> * * * Only Indians are entitled to be enrolled for the purpose of receiving allotment and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian. Moore's mother failed to be enrolled as a St. Croix Indian because she was too young, not because she was not an Indian. (Pp. 31–32.)

[214] See Chapter 7, sec. 4. In matters affecting the distribution of tribal funds and other property under the supervisory authority of the Secretary, tribal action on membership is subject to the supervisory authority of the Secretary. See Chapter 7, sec. 4; Sol. Memo. October 12, 1937; Sol. Memo. March 24, 1936. According to administrative practice, in doubtful cases the tribal action is regarded as controlling.

The Circuit Court of Appeals in *Vezina* v. *United States*, 245 Fed. 411, 415 (C. C. A. 8, 1917), said

> The law did not call for the consent of the Indians to the making of the list for allotment. That power was solely vested in the commissioners, but they wisely in the main decided to take the advice of an Indian council, * * *.

[215] Citizenship in a tribe and tribal membership are sometimes used synonymously. *Seminole Nation* v. *United States*, 78 C. Cls. 455 (1933).

The agent has the duty of preparing certain statistics concerning Indians under his charge. Sec. 4 of the Act of March 3, 1875, 18 Stat. 420, 449, 25 U. S. C. 133, provides:

> That hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance.

Sec. 9 of the Act of July 4, 1884, 23 Stat. 76, 98, 25 U. S. C. 208, provides that the Indian agent shall submit in his annual report a census of the Indians at his agency or upon the reservation under his charge, and the number of school children between the ages of 6 and 16, the number of school houses at his agency, and other data concerning the education of the Indians.

[216] Act of June 30, 1919, sec. 1, 41 Stat. 3, 9.

[217] 5 Op. A. G. 320 (1851).

[218] Act of June 4, 1920, 41 Stat. 751 (Crow). See *Cully* v. *Mitchell*, 37 F. 2d 493 (C. C. A. 10, 1930); *United States* v. *Wildcat*, 244 U. S. 111 (1917).

[219] *United States* v. *Wildcat*, 244 U. S. 111 (1917).

[220] Unless Congress confers authority upon the Secretary to inquire into the validity of the enrollment of a person whose name appears on the final rolls, the rolls must be regarded as determinative of legal membership in the tribe at the time the rolls were completed and closed. See Op. Sol. I. D., M.27759, January 22, 1935.

[221] *United States ex rel. West* v. *Hitchcock*, 205 U. S. 80 (1907). The Secretary has been held not to have the power to strike names from the roll without giving notice and an opportunity to be heard. *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). It has been held that he has power, after such notice and hearing, to strike from the rolls names which have been placed thereon through fraud or mistake. *Lowe* v. *Fisher*, 223 U. S. 95 (1912).

Determinations of the Dawes Commission were subject to attack for extrinsic fraud or mistake. *Tiger* v. *Twin State Oil Co.*, 48 F. 2d 509 (C. C. A. 10, 1931).

[222] *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). See *United States ex rel. West* v. *Hitchcock*, 205 U. S. 80 (1907).

[223] *Stookey* v. *Wilbur*, 58 F. 2d 522 (App. D. C., 1932).

[224] 34 Stat. 137.

[225] 253 U. S. 209 (1920).

various Indian tribes,[63] it did bring about the regularization of the procedures of tribal government and a modification of the relations of the Interior Department to the activities of tribal government. Section 16 of the Act of June 18, 1934,[64] established a basis for the adoption of tribal constitutions approved by the Secretary of the Interior, which could not thereafter be changed except by mutual agreement or by act of Congress. This section was explained in a circular letter of the Commissioner of Indian Affairs sent out almost immediately after the approval of the Act of June 18, 1934, in the following terms:

> SEC. 16. *Tribal Organization.*—
>
> Under this section, any Indian tribe that so desires may organize and establish a constitution and by-laws for the management of its own local affairs.
>
> Such constitution and by-laws become effective when ratified by a majority of all the adult members of the tribe,[64] or the adult Indians residing on the reservation, at a special election. It will be the duty of the Secretary of the Interior to call such a special election when any responsible group of Indians has prepared and submitted to him a proposed constitution and by-laws which do not violate any Federal Law, and are fair to all the Indians concerned. When such a special election has been called, all Indians who are members of the tribe, or residents on the reservation if the constitution is proposed for the entire reservation, will be entitled to vote upon the acceptance of the constitution. * * * If a tribe or reservation adopts the constitution and by-laws in this manner, such constitution and by-laws may thereafter be amended or entirely revoked only by the same process.
>
> The powers which may be exercised by an Indian tribe or tribal council include all powers which may be exercised by such tribe or tribal council at the present time, and also include the right to employ legal counsel (subject to the approval of the Secretary of the Interior with respect to the choice of counsel and the fixing of fees), the right to exercise a veto power over any disposition of tribal funds or other assets, the right to negotiate with Federal, State and local governments, and the right to be advised of all appropriation estimates affecting the tribe, before such estimates are submitted to the Bureau of the Budget and Congress.
>
> The following Indian groups are entitled to take advantage of this section: Any Indian tribe, band, or pueblo in the United States (outside of Oklahoma) or Alaska, and also any group of Indians who reside on the same reservation, whether they are members of the same tribe or not.

The constitutions adopted pursuant to this section and those adopted pursuant to similar provisions of law applicable to Alaska[65] and Oklahoma[66] vary considerably with respect to the form of tribal government, ranging from ancient and primitive forms in tribes where such forms have been perpetuated, to models based upon progressive white communities.

The powers of self-government vested in these various tribes likewise vary in accordance with the circumstances, experience, and resources of the tribe.[67] The extent to which tribal powers are subject to departmental review is again a matter on which tribal constitutions differ from each other.

The procedure by which tribal ordinances are reviewed, where such review is called for, is a matter which in nearly all tribal constitutions has been covered in substantially identical terms. A typical provision is that of the constitution of the Blackfeet Tribe,[68] which reads as follows:

> ARTICLE VI. POWERS OF THE COUNCIL
>
> * * * * *
>
> SEC. 2. *Manner of review.*—Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation, who shall, within ten (10) days thereafter, approve or disapprove the same. If the superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the tribal council of such decision. If the superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten (10) days after its enactment, he shall advise the Blackfeet Tribal Business Council of his reason thereof. If these reasons appear to the council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

Under the procedure thus established, positive action is required to validate an ordinance that is subject to departmental review. Failure of the superintendent to act within the prescribed period operates as a veto.[69] Failure of the superintendent or other departmental employees to act promptly in transmitting to the Secretary an ordinance validly submitted and approved does not extend the period allowed for secretarial veto.[70] On the other hand, where a superintendent vetoes an ordinance, failure of the tribe to act in accordance with the prescribed procedure of referring the ordinance, after a new vote, to the Secretary of the Interior, will preclude validation of the ordinance.[71]

Secretarial review of tribal ordinances, like Presidential review of legislation, involves judgments of policy as well as judgments of law and constitutionality. Only a small proportion of such ordinances have been vetoed. The reasons most commonly advanced for such action by the Secretary of the Interior are:

1. That the ordinance violates some provision of the tribal constitution;[72]
2. That the ordinance violates some federal law;
3. That the ordinance is unjust to a minority group within the tribe.

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[63] See Memo. Sol. I. D., March 25, 1939. Undoubtedly, the act had some effect upon the attitude of administrative agencies towards powers which had been theoretically vested in Indian tribes but frequently ignored in practice. See, for instance, decision of the Comptroller General A–86599, June 30, 1937, upholding tribal power to collect rentals from tribal land and declaring:

> * * * having in view the broad purposes of the act, as shown by its legislative history, to extend to Indians the fundamental rights of political liberty and local self-government, and there having been shown the fact that some of the power so granted by the new act would require the use of tribal funds for their accomplishment—being necessary incidents of such powers—, and the further fact that the act of June 25, 1936, 49 Stat. 1928, provides that section 20 of the Permanent Appropriation Repeal Act, 48 Stat. 1233, shall not apply to funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the act of June 18, 1934, this office would not be required to object to the procedures suggested in your memorandum for the handling of tribal funds of Indian tribes organized pursuant to the said act of June 18, 1934.

[64] 48 Stat. 984, 987, 25 U. S. C. 476.

[64] This rule was modified by the Act of June 15, 1935, sec. 1, 49 Stat. 378, 25 U. S. C. 478a, which substituted the requirement of majority vote of those voting in an election where 30 percent of the eligible voters cast ballots.

[65] See Chapter 21, sec. 9.

[66] For a list of Oklahoma constitutions and charters, see Chapter 23, sec. 13.

[67] It has been administratively determined that constitutions of groups not previously recognized as tribes, in the political sense, cannot include powers derived from sovereignty, such as the power to tax, condemn land of members, and regulate inheritance. Memo. Sol. I. D., April 15, 1936. (Lower Sioux Indian Community; Prairie Island Indian Community.)

[68] Approved December 13, 1935.

[69] Memo. Sol. I. D., April 11, 1940 (Walker River Paiute).

[70] Memo. Sol. I. D., October 23, 1936 (San Carlos Apache).

[71] See Memo. Sol. I. D., April 11, 1940 (Walker River Paiute).

[72] See, for example, Memo. Sol. I. D., December 14, 1937 (Hopi).

a "prospective right"[4] to future income from tribal property in which he has no present interest.[5] Other terms used to picture this right are "an inchoate interest,"[6] and a "float."[7] These terms aptly characterize the intangible right of the Indian to share in tribal property. Until the property loses its tribal character and becomes individualized, his right can be no more than this, except insofar as federal law, tribal law, or tribal custom may give him a more definite right of occupancy in a particular tract. In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions.[8] In the case of lands, he has no vested right unless the land or some designated interest therein has been set aside for him either severally or as tenant in common.[9]

The statement has often been made that the tribe holds its property in trust for its members.[10] This statement may be compared with the assertion frequently made that corporate property is held in trust for the stockholders, though, strictly speaking, no technical trust relationship exists in either case.

In speaking of the title to the lands of the Creek Nation, the court in *Shulthis* v. *McDougal*,[11] declared:

> The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members.[12]

Indian lands were generally looked upon as a permanent home for the Indians. "Considered as such, * * * it was not unnatural or unequal that the vast body of lands not thus specifically and personally appropriated should be treated as the common property of the Nation * * *."[13]

That tribal property should be held in common for the benefit of the members of the Indian community as a whole was, according to the Supreme Court in the case of *Woodward* v. *de Graffenried*, the principle upon which conveyances of land to the Five Civilized Tribes were made.[14] Treaties often provided that the land conveyed to the tribe was to be held in common.[15]

Likewise certain statutes specify that tribal lands are to be held or occupied in common.[16]

Indian tribal laws and customs led governments dealing with Indian lands to adopt the theory that tribal property was held for the common benefit of all.[17] The constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declared in section 2, article 1, that the lands of the Cherokee Nation were to remain the common property of the tribe.[18]

In the case of *United States* v. *Charles*,[19] the court, in referring to the lands occupied by the Tonawanda Band of Seneca Indians, stated, "The reservation lands are held in common by the tribe, although individual members of the tribe may be in possession of a particular tract, and such possession is recognized by the tribe." (P. 348.) Many tribal constitutions, adopted under the Wheeler-Howard Act,[20] provide that all lands hitherto unallotted shall be held in the future as tribal property.[21]

Although tribal property is vested in the tribe as an entity, rather than in the individual members thereof, each member of the tribe may have an interest in the property.

The nature of the individual member's right in tribal property is discussed in *Seufert Bros. Co.* v. *United States*.[22] The court quotes the words of an Indian witness who compared a river in which there was a common right to fish to a "great table where all the Indians came to partake." (P. 197.)

In the case of *Mason* v. *Sams*, the Treaty of 1855 between the United States and the Quinaielts[23] is discussed. By the terms of article two of the treaty, a tract of land was to be "reserved for the use and occupation of the tribes * * * and set apart for their exclusive use." The court construed the treaty to give the Indians an exclusive right of fishing in the waters on these lands; the right to fish being enjoyed by all members, even though the treaty was made with the tribe.[24]

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[4] Op. Sol. I. D., M.8370, August 15, 1922.

[5] *Taylor* v. *Tayrien*, 51 F. 2d 884 (C. C. A. 10, 1931), cert. den. 284 U. S. 672 (1931). This case involved individual rights in Osage tribal minerals. For a discussion of special laws governing Osage tribe see Chapter 23, sec. 12.

[6] *Taylor* v. *Tayrien*, 51 F. 2d 884 (C. C. A. 10, 1931), cert. den. 284 U. S. 672 (1931).

[7] *McKee* v. *Henry*, 201 Fed. 74 (C. C. A. 8, 1912); *Woodbury* v. *United States*, 170 Fed. 302 (C. C. A. 8, 1909). The cases involved rights of an enrollee before allotments had been made. In an opinion involving back annuity payments, the Solicitor of the Department of the Interior wrote: "The members of a tribe have an inherent interest in the tribal lands and funds but until segregated by allotment or payment in severalty they remain the common property of the tribe." Op. Sol. I. D., D. 42071, December 29, 1921.

[8] Funds due Osage as share in royalties and proceeds from sale of land, not his until actually paid to him or placed to his credit—Op. Sol. I. D., M.8370, August 15, 1922. See Chapter 23, sec. 12B. So long as a judgment in favor of a tribe is not prorated among individual members, no present or former member has a vested right—Letter of Commissioner of Indian Affairs to Indian Agents, October 9, 1937.

[9] *Gritts* v. *Fisher*, 224 U. S. 640 (1912); *St. Marie* v. *United States*, 24 F. Supp. 237 (D. C. S. D. Cal. 1938), aff'd — F. 2d — (C. C. A. 10, 1940); 56 I. D. 102 (1937); *McKee* v. *Henry*, 201 Fed. 74 (C. C. A. 8, 1912).

[10] *Ligon* v. *Johnston*, 164 Fed. 670 (C. C. A. 8, 1908), app. dism. 223 U. S. 741; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902).

[11] 170 Fed. 529, 533 (C. C. A. 8, 1909), aff'd 225 U. S. 561 (1912).

[12] Also see *W. O. Whitney Lumber & Grain Co.* v. *Crabtree*, 166 Fed. 738 (C. C. A. 8, 1908). Title to Creek lands were in nation; occupants had no more than possessory rights.

[13] *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 215 (1894).

[14] 238 U. S. 284 (1915). Accord: *Heckman* v. *United States*, 224 U. S. 413 (1912), modify'g and aff'g sub nom. *United States* v. *Allen*, 179 Fed. 13 (C. C. A. 8, 1910). See *Shulthis* v. *McDougal*, 170 Fed. 529 (C. C. A. 8, 1909), app. dism. 225 U. S. 561 (1912).

[15] See, for example: Treaty of December 29, 1832, with the United Nation of the Senecas and Shawnee Indians, 7 Stat. 411; Treaty of May 30, 1854, with the United Tribes of Kaskaskia and Peoria, Piankeshaw, and Wea Indians, 10 Stat. 1082; Treaty of June 22, 1855, with Choctaws and Chickasaws, 11 Stat. 611; Treaty of August 6, 1846, with Cherokee, 9 Stat. 871, discussed in *The Cherokee Trust Funds*, 117 U. S. 288 (1886), and *United States* v. *Cherokee Nation*, 202 U. S. 101 (1906).

[16] See, for example, Joint Resolution, June 19, 1902, 32 Stat. 744 (Walker River, Uintah, and White River Utes). Various allotment statutes reserve from allotment lands to be held "in common," specifying occasionally for the reservation of grazing or timber lands, lands containing springs, etc. See, for example: Act of March 3, 1885, 23 Stat. 340 (Umatilla Reservation); Act of March 2, 1889, 25 Stat. 1013 (United Peorias and Miamies); Act of June 3, 1926, 44 Stat. 690 (Northern Cheyenne Indian Reservation). See, also, Chapter 15.

[17] See *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835).

[18] Cited and discussed in *Cherokee Intermarriage Cases*, 203 U. S. 76 (1906), and in *The Cherokee Trust Funds*, 117 U. S. 288 (1886).

[19] 23 F. Supp. 346, 348 (D. C. W. D. N. Y. 1938).

[20] Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 461, *et seq.*

[21] *E. g.*, Art. 8, sec. 2, of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho, approved April 30, 1936.

[22] 249 U. S. 194 (1919), aff'g sub nom. *United States ex rel. Williams* v. *Seufert Bros. Co.*, 233 Fed. 579 (D. C. Ore. 1916).

[23] 12 Stat. 971.

[24] 5 F. 2d 253 (D. C. W. D. Wash. 1925). Accord: *Halbert* v. *United States*, 283 U. S. 753 (1931), rev'g sub nom. *United States* v. *Halbert*, 38 F. 2d 795 (C. C. A. 9, 1930).

SECTION 6. INDIVIDUAL RIGHTS UPON DISTRIBUTION OF TRIBAL PROPERTY

The extent of individual participation in the distribution of tribal property is governed, in the first instance by the federal statute or treaty authorizing the distribution, or, where the federal law is silent, by the law or custom of the tribe.

Apportionment and distribution of tribal funds may be affected by acts passed by Congress in the exercise of its plenary power over tribal property.[126] The manner in which the plenary power over tribal property could be exercised to affect the individual's rights is discussed elsewhere.[127]

A. MODES OF DISTRIBUTION

Where Congress has prescribed the method of distributing tribal property, equal division per capita has been the general rule.[128] This method of apportionment is consistent with the nature of the individual's interest in tribal property and is found in numerous treaties and acts providing for the distribution of tribal property.[129] "Every member of the tribe has an interest in preventing one member from getting more than his share * * *."[130]

However, the act, treaty, or custom providing for distribution may restrict the class of those entitled to participate in a given distribution or deviate from the equality rule by differentiating among various classes of participants. Certain classes of members may receive more tribal property at given times than others.[131]

Even in the same class there have been inequalities in the distribution of tribal assets. For example, many allotments were made on the basis of acreage rather than value, although equality of acreage might co-exist with wide inequality of values.

Ordinarily, in the distribution of money, the wants of all individuals are, for all practical purposes, infinite and equal, and equal per capita distribution is a well-nigh universal rule.[132]

Where, however, the Federal Government has provided for a distribution of land or overcoats or teams of oxen, differentiations have frequently been made between adults and infants or between heads of families and dependents or between men and women.[133] Likewise, where divisions exist within a tribe, based upon separations in migration, degree of blood, or other historical factors, these factors have frequently been taken into account in treaties and statutes.[134]

Occasionally Congress, instead of specifying a total amount to be distributed within a given class, has allocated out of the tribal estate a fixed amount of money or property to each member of a tribe,[135] or to each member who meets certain qualifications.[136]

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[126] See Chapter 5, sec. 5B.

[127] See Chapter 5, sec. 5.

[128] On the application of this rule to the allotment of tribal land, see Chapter 11. The application of this rule in the distribution of annuities is discussed in Chapters 10 and 15.

[129] *E. g.*, Act of April 30, 1888, c. 206, 25 Stat. 94 (Sioux Nation); Act of April 27, 1904, c. 1620, 33 Stat. 319 (Devils Lake Reservation Indians); Act of June 28, 1906, c. 3578, 34 Stat. 547 (Menominee); Act of March 2, 1907, c. 2536, 34 Stat. 1230 (Rosebud Sioux).

[130] *Tiger* v. *Twin State Oil Co.*, 48 F. 2d 509, 511 (C. C. A. 10, 1931), aff'g sub nom. *Kemohah* v. *Shaffer Oil and Refining Co.*, 38 F. 2d 665 (D. C. N. D. Okla. 1930).

[131] In passing upon the distributing of a tribal fund created for the purpose of paying to certain Stockbridge-Munsee Indians their share in tribal property, said Indians having been erroneously omitted from the distribution of an earlier fund, the Solicitor of the Department of the Interior declared:

> The fund created was for one purpose only. Consequently there is no merit to the contention that if the fund be tribal or communal then it must be subject to disbursement for tribal expenditures generally, and that it is necessarily individual and not tribal because all members do not participate in its distribution. The very purpose of the appropriation refutes the contention. Op. Sol. I. D., D. 42071, December 29, 1921.

Cf. Treaty of March 28, 1836, with the Ottawas and Chippewas, 7 Sat. 491, providing for payments of different amounts to different classes of half-breeds.

[132] Per capita payment was made the general rule, except where the interest of the Indians or some treaty stipulation otherwise required, by sec. 3 of the Act of March 3, 1853, 10 Stat. 226, 239. This provision superseded a provision to the same general effect in sec. 3 of the Act of August 30, 1852, 10 Stat. 41, 56, which made permanent the clause which had been included as a limitation upon the appropriations made by earlier appropriation acts. See section 3 of Act of July 21, 1852, 10 Stat. 15, 23. Recent statutes providing for per capita distribution of various funds are cited in fn. 135 and 144 *infra*.

[133] Thus, for example, the original General Allotment Act of February 8, 1887, sec. 1, 24 Stat. 388, 25 U. S. C. 331, authorized the allotment of land in these terms:

> To each head of a family, one-quarter of a section;
> To each single person over eighteen years of age, one-eighth of a section;
> To each orphan child under eighteen years of age, one-eighth of a section; and
> To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

[134] An example of a treaty provision modifying the general rule of equality is Art. 10 of the Treaty of October 1, 1859, with the Sacs and Foxes of the Mississippi, 15 Stat. 467, 470. Under this treaty half-bloods and intermarried Indians might receive certain tribal lands assigned to them in severalty, but then they would have no share in other tribal property, even though they remained members of the tribe.

See, for example, secs. 4 and 5, Act of July 29, 1848, 9 Stat. 252, 264–265 (N. C. Cherokees); Act of January 18, 1881, 21 Stat. 315 (Winnebago Indians); Act of October 19, 1888, 25 Stat. 608 (Cherokee freedmen); Act of October 1, 1890, 26 Stat. 636 (Shawnee and Delaware Indians and Cherokee freedmen); Act of March 3, 1893, 27 Stat. 744 (Stockbridge and Munsee tribe); Act of April 28, 1904, 33 Stat. 519 (Wyandotte Indians); Act of March 1, 1907, 34 Stat. 1055 (Sac and Fox Indians); Act of August 11, 1916, 39 Stat. 509 (Rosebud Sioux Reservation); Act of March 4, 1917, 39 Stat. 1195 (Santee Sioux); Act of April 14, 1924, 43 Stat. 95 (Chippewas of Minnesota); Act of May 3, 1928, 45 Stat. 484 (Sioux Tribe); Act of March 4, 1929, 45 Stat. 1550 (Loyal Shawnee Indians); Act of March 3, 1931, 46 Stat. 1495 (Blackfeet Tribe).

The following Appropriation Acts include special provisions for per capita payments to specified individuals or classes of individuals within a given tribe; Act of March 3, 1855, sec. 3, 10 Stat. 686 (North Carolina Cherokees); Act of July 31, 1854, sec 8(7), 10 Stat. 315, 333 (Cherokees); Act of August 18, 1856, sec. 14, 11 Stat. 81, 92 (Cherokees east of the Mississippi); Act of June 14, 1858, 11 Stat. 362 (Cherokees); Act of March 3, 1875, 18 Stat. 402, 412 (Kickapoo); Act of July 4, 1884, 23 Stat. 76, 81 (Kickapoo); Act of June 29, 1888, 25 Stat. 217, 222–223 (Kickapoo); Act of March 3, 1891, 26 Stat. 989, 1010 (Creek Nation of Indians); Act of June 10, 1896, 29 Stat. 321, 334 (Flandreau Band of Sioux and Santee Sioux in Nebraska) and pp. 358–359, Art. II (Apache, Mohave, and Yuma); Act of July 1, 1898, 30 Stat. 571, 578 (Kickapoo); Act of March 1, 1899, 30 Stat. 924, 931 (Kickapoo); Act of March 3, 1905, 33 Stat. 1048, 1052 (Kickapoo) and pp. 1078–1079, Art. II (Port Madison Indian Reservation) Act of March 4, 1929, 45 Stat. 1562, 1587 (Saint Croix Chippewas of Minnesota); Act of May 14, 1930, 46 Stat. 279, 285 (Sioux).

Special rights of participation in tribal property granted to mixed bloods of various tribes gave rise to "half-breed scrip." Act of July 17, 1854, 10 Stat. 304 (Sioux Nation). See also Appropriation Act of March 3, 1885, 23 Stat. 362, 368 (Kaw or Kansas Tribe).

[135] Act of August 22, 1911, 37 Stat. 44 (Choctaw, Chickasaw, Cherokee, and Seminole Indians); Act of November 19, 1921, 42 Stat. 221 (Chippewas of Minnesota); Act of January 25, 1924, 43 Stat. 1 (Chippewas of Minnesota); Act of January 30, 1925, 43 Stat. 798 (Chippewas of Minnesota); Act of February 19, 1926, 44 Stat. 7 (Chippewas of Minnesota); Act of March 15, 1928, 45 Stat. 314 (Chippewas of Minnesota); Act of April 28, 1928, 45 Stat. 467 (Shoshones and Arapahoes of Wyoming); Act of May 11, 1928, 45 Stat. 497 (Rosebud Sioux Indians); Act of May 26, 1928, 45 Stat. 747 (Pine Ridge Sioux Indians); Act of December 23, 1929, 46 Stat. 54 (Chippewas of Minnesota); Act of March 24, 1930, 46 Stat. 88 (Shoshone and Arapahoe); Act of April 15, 1930, 46 Stat. 169 (Pine Ridge, South Dakota); Act of February 3, 1931, 46 Stat. 1060 (Shoshone and Arapahoe); Act of February 14, 1931, 46 Stat. 1102 (Menominees of Wisconsin); Act of February 14, 1931, 46 Stat. 1107 (Chippewas of Minnesota); Act of February 12, 1932, 47 Stat. 49

To equalize allotments, various acts provide for the payment [137] or the withholding of payment [138] of tribal funds to individuals.

B. TIME OF DISTRIBUTION

Ordinarily, acts providing for the distribution of tribal assets provide for the immediate payment of the entire share to those entitled to it. Individual rights vest immediately upon segregation, and the tribal character of the property is extinguished.[139]

In some special acts providing for distribution of tribal property, Congress has seen fit to withhold payment of some or all of the Indian's share until some future time.[140]

C. THE LIMITS OF LEGISLATIVE DISTRIBUTION

Oftentimes, the act or treaty providing for the distribution of tribal lands or tribal funds does not state specifically the proportion each member is to receive, but leaves the distribution to the decision of the tribe.[141] Tribal charters generally limit the amount and mode in which tribal property may be distributed,[142] and in some cases prohibit any per capita distribution of tribal funds.[143]

So long as the Federal Government sought to achieve the breaking up of tribal estates, legislative distribution of tribal funds was the order of the day.[144]

(Chippewas of Minnesota); Act of June 14, 1932, 47 Stat. 306 (Red Lake of Minnesota); Act of June 14, 1932, 47 Stat. 307 (Menominees of Wisconsin); Act of January 20, 1933, 47 Stat. 773 (Chippewas of Minnesota); Act of June 3, 1933, 48 Stat. 112 (Menominee); Act of June 15, 1933, 48 Stat. 146 (Seminole); Act of June 16, 1933, 48 Stat. 254 (Red Lake); Act of May 7, 1934, 48 Stat. 668 (Chippewas of Minnesota); Act of July 2, 1935, 49 Stat. 444 (Red Lake); Act of June 20, 1936, 49 Stat. 1568 (Blackfeet).

[136] The Act of April 30, 1888, 25 Stat. 94 (later amended by the Act of June 21, 1906, 34 Stat. 325, 326), established the right to "Sioux benefits" in the following terms:

> * * * That each head of family or single person over the age of eighteen years, who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also twenty dollars in cash. (P. 101.)

And see Act of March 3, 1909, 35 Stat. 751 (Quapaw, Modoc, Klamaths); Act of June 1, 1938, 52 Stat. 605 (Klamath).

[137] See the Act of April 26, 1906, c. 1876, 34 Stat. 137 (Five Civilized Tribes).

[138] See the Act of March 1, 1901, 31 Stat. 861, 862–863 (Creek).

[139] Parallel problems arise in the law of corporations, future interests, and trusts. See *Cogswell* v. *Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059 (1905), aff'd sub nom. *Jerome* v. *Cogswell*, 204 U. S. 1 (1907), holding that the declaration of a dividend, payable at some future date, creates a debt in favor of the stockholder against the corporation. When a fund out of which the dividend is to be paid is segregated, a trust for the benefit of the stockholders is imposed upon the segregated fund. See *New York Trust Co.* v. *Edwards*, 274 Fed. 952 (D. C. S. D. N. Y. 1921); *Staats* v. *Biograph Co.*, 236 Fed. 454 (C. C. A. 2, 1916). See also *Hayward* v. *Blake*, 247 Mass. 430, 142 N. E. 52 (1924), to the effect that income accruing to a life tenant during his lifetime, but not yet payable at the date of his death, is payable to his estate.

[140] The Act of January 14, 1889, 25 Stat. 642, provided for the sale of certain tribal lands of the Chippewa Indians of Minnesota. Sec. 7 provided in part:

> That all money accruing from the disposal of said lands * * * shall * * * be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years * * * and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years * * * be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians * * *; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: * * * The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually * * * until such time as said permanent fund * * * shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund * * *.

Under this act, three-fourths of the interest is to be paid annually to the eligible Indians in equal shares per capita. Any advances made can come only from the interest, and the Secretary of the Interior cannot segregate and advance to any individual Chippewa his pro rata share of the permanent fund. If he were allowed to do this, there is a possibility that the permanent fund set apart for the benefit of all Chippewas might be seriously depleted or exhausted (Op. Sol. I. D., M.11879, May 31, 1924). The policy behind keeping the fund intact for the period of 50 years was to prevent the Indians from squandering their wealth; it was supposed that, during the 50-year period, they would have become sufficiently educated to realize the value of their property.

However, by virtue of the Act of May 18, 1916, c. 125, 39 Stat. 123, 135, the Secretary of the Interior was authorized in his discretion to advance to any individual entitled to participate in the permanent fund of the Chippewas

> * * * one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided further*, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled * * *.

(Discussed Op. Sol. I. D., M.15954, January 8, 1927.)

The question of the proportionate distribution of the interest accruing upon the Chippewa fund was discussed in an opinion of the Solicitor of the Interior Department (Op. Sol. I. D., M.15954, January 8, 1927).

[141] The Act of March 3, 1839, 5 Stat. 349, 350, providing for the division and distribution of lands belonging to the Brothertown Indians by a board of commissioners, stated that it was the duty of the board "to make a just and fair partition and division of said lands among the members of said tribe, or among such of them as, by the laws and customs and regulations of said tribe, are entitled to the same, and in such proportions and in such manner as shall be consistent with equity and justice, and in accordance with the existing laws, customs, usages, or agreements of said tribe." Numerous other acts which leave the distribution of tribal property to the tribe itself are discussed in Chapter 15, secs. 23 and 24.

[142] For example, the corporate charter of the Winnebago Tribe of Nebraska, ratified August 15, 1936, provides:

> The Tribe may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Tribe and may distribute per capita, among the recognized members of the Tribe, all profits of corporate enterprises or income over and above sums necessary to defray corporate obligations and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of tribal government, the needs of charity, or other corporate purpose. No such distribution of profits or income in any one year amounting to a distribution of more than one-half of the accrued surplus, shall be made without the approval of the Secretary of the Interior. No distribution of the financial assets of the Tribe shall be made except as provided herein or as authorized by Congress.

[143] For example, the corporate charter of the Gila River Pima-Maricopa Indian Community (ratified February 28, 1938) provides, in sec. 8: "No per capita distribution of any assets of the community shall be made."

[144] Act of June 10, 1872, 17 Stat. 388 (Ottawa); Act of March 3, 1873, 17 Stat. 623 (Ottawa); Act of May 15, 1888, 25 Stat. 150 (Omaha); Act of August 19, 1890, 26 Stat. 329 (Omaha tribe); Act of February 13, 1891, 26 Stat. 749 (Sac and Fox and Iowa); Act of August 11, 1894, 28 Stat. 276 (Omaha); Act of February 20, 1895, 28 Stat. 677 (Ute); Act of February 28, 1899, 30 Stat. 909 (Pottawatomie and Kickapoo); Act of June 6, 1900, 31 Stat. 672 (Fort Hall); Act of February 28, 1901, 31 Stat. 819 (Seneca); Act of February 20, 1904, 33 Stat. 46 (Red Lake); Act of April 23, 1904, 33 Stat. 254 (Sioux); Act of April 23, 1904, 33 Stat. 302 (Flathead); Act of April 27, 1904, 33 Stat. 319 (Devils Lake); Act of April 27, 1904, 33 Stat. 352 (Crow); Act of April 28, 1904, 33 Stat. 567 (Grande Ronde); Act of December 21, 1904, 33 Stat. 595 (Yakima); Act of March 3, 1905, 33 Stat. 1016 (Shoshone or Wind River); Act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of March 22, 1906, 34 Stat. 80 (Colville); Act of June 14, 1906, 34 Stat. 262 (Indians in Richardson County, Nebraska); Act of May 30, 1908, 35 Stat. 558 (Fort Peck); Act of February 18, 1909, 35 Stat. 628 (Omaha and Winebago); Act of March 3, 1909, 35 Stat. 75) (Quapaw); Act of May 13, 1910, 36 Stat. 368 (Richardson County, Nebraska); Act of May 11, 1912, 37 Stat. 111 (Omaha); Act of July 1, 1912, 37 Stat. 187 (Winnebago); Act of February 14, 1913, 37 Stat.

strictions on allotments held by adult mixed bloods. In *United States v. Park Land Co.*,[20] the court construes this amendment to remove from federal control the sale of lands in the White Earth Reservation and the proceeds derived therefrom by the adult mixed-blood Indian, no matter how it has come to him. As for an adult full blood, the act provides that the Secretary of the Interior may remove the restrictions upon the sale of his allotment if satisfied that that Indian is competent to handle his own affairs. Till then, Congress retains control over the land and the proceeds therefrom.

Section 1 of the Act of May 29, 1908,[21] which expressly excludes from its scope lands in Oklahoma, Minnesota, and South Dakota, permits the sale of allotments on petition of the allottee, his heir, or duly authorized representative,

> *Provided*, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: * * *

Sections 1[22] and 4[23] of the Act of June 25, 1910,[24] provide generally for the control of the proceeds from the sale or lease of the Indian's restricted lands. Section 8 of the act allows the sale of timber on trust allotments with the consent of the Secretary of the Interior and the distribution of the proceeds to the allottee or disposal for his benefit under rules and regulations prescribed by the Secretary of the Interior.[25]

The imposition of a trust over Indian funds may be effectuated by treaty as well as by statute. In the treaty concluded September 30, 1854,[26] between the United States and certain Chippewa Indians, a system of allotting tribal lands was established. Article 3 of the treaty provided that the President was to assign the allotments and that he might issue patents "with such restrictions of the power of alienation as he might see fit to impose." In the exercise of this power, he may include in the patent a restriction against alienation without his consent. In the case of *Starr v. Campbell*,[27] it is held that this restriction extends to the timber on the land and therefore the President could regulate the distribution of the proceeds from the sale of the timber.[28]

On the other hand, Congress may permit the leasing of allotted lands, subject to the approval of the Secretary of the Interior, but specifically providing that the allottees "* * * shall have full control of the same, including the proceeds thereof * * *."[29]

A perusal of the acts cited indicates a general intent of Congress to retain, for a time, governmental control of the proceeds from the disposition of restricted allotted lands and to leave to the discretion of administrative officials the time and manner in which such funds are to be distributed or expended, subject to the qualification that the funds be used for the benefit of the Indian.

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[20] 188 Fed. 383 (C. C. Minn. 1911). In *United States v. First National Bank*, 234 U. S. 245 (1914), aff'g 208 Fed. 988 (C. C. A. 8, 1913), a case involving an attempt by the United States to set aside a conveyance of land by an Indian having less than one-eighth white blood, the Supreme Court held that any identifiable amount of white blood brought an Indian within the scope of the provision of the Act of March 1, 1907, removing restrictions upon the allotments of mixed-blood Indians.

[21] 35 Stat. 444, 25 U. S. C. 404.

[22] * * * All sales of lands allotted to Indians * * * shall be made under such rules and regulations * * * as the Secretary of the Interior may prescribe * * * *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear * * *.

The section permits the deposit of Indian funds held by federal disbursing agents in banks. This provision is not affected by the Act of March 3, 1928, 45 Stat. 161, amending sec. 1. See 25 U. S. C. 372.

[23] Sec. 4 provides for the leasing of allotted lands for a period not to exceed 5 years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior. See 25 U. S. C. 403.

[24] 36 Stat. 855. This act applies to proceeds derived from the sale of lands held in trust as well as lands in which the power of alienation is restricted. *United States v. Bowling*, 256 U. S. 484 (1921), rev'g 261 Fed. 657 (D. C. E. D. N. Y. 1919).

[25] The Act of March 4, 1907, 34 Stat. 1413, provides also for the sale of merchantable timber on allotments on the Jicarilla Reservation and declares that the proceeds therefrom are to be expended under the direction of the Secretary of the Interior for purposes beneficial to the Indians.

In the Appropriation Act of May 18, 1916, 39 Stat. 123, Congress provided for the disposal of flowage rights on the allotments of Indians of the Lac Court Oreilles Tribe. The provision states that,

> any allottee or the heirs of any deceased allottee, as a condition to giving his or their consent to the leasing or granting of flowage rights on their respective allotments, may determine, subject to the approval of the Secretary of the Interior, what consideration or rental shall be received for such flowage rights, and in what manner and for what purposes such consideration or rental shall be paid or expended; and the consideration or rental shall be paid or expended under such rules and regulations as the Secretary of the Interior may prescribe. (P. 158.)

Under the agreement concluded between the Columbia and Colville Indians and the United States on July 7, 1883, ratified by the Appropriation Act of July 4, 1884, 23 Stat. 76, 79–80, allotments of tribal lands are made, but no provision is made for the sale of allotments; hence no problem of rights in funds therefrom could arise. However, by the Act of March 4, 1911, 36 Stat. 1358, Congress authorizes the Secretary of the Interior to sell some of the land held in trust for certain named Indians and to conserve the funds for the benefit of the allottee or to invest or expend them for the individual's benefit in such manner as he might determine. The Act of May 20, 1924, c. 160, 43 Stat. 133, permits the disposition of patented lands by the Columbia or Colville allottee, or if he were deceased, the heirs might convey the land in accordance with the provisions of the Act of June 25, 1910, 36 Stat. 855.

[26] 10 Stat. 1109.

[27] 208 U. S. 527 (1908).

[28] See Chapter 11, sec. 4B. Under the regulations approved by the President December 8, 1893, proceeds from the sale of timber from allotted lands, after the deduction of expenses, were to be deposited in some national bank, subject to the check of the allottee, countersigned by the Indian agent. In December 1902 the regulations were amended so that if the allottee were deemed incompetent to manage his own affairs, the agent had the authority, subject to the approval of the Commissioner of Indian Affairs, to fix the amounts the Indian could withdraw. For regulations regarding timber, see 25 C. F. R. 61.1–61.29.

[29] Osage Allotment Act of June 28, 1906, sec. 7, 34 Stat. 539, 545. For a discussion of this statute, see Chapter 23, sec. 12A.

SECTION 4. SOURCES OF INDIVIDUAL PERSONAL PROPERTY—INDIVIDUALIZATION OF TRIBAL FUNDS

A second important source of individual funds is the individualization of tribal funds.[30] Since tribal funds generally represent the income from disposition of tribal lands, the Federal Government has commonly extended the restrictions on the land to the proceeds therefrom. By a further extension, Congress has frequently imposed, as conditions to the right of the individual to participate in tribal funds, certain restrictions affecting his use of the funds after they have become individualized.[31]

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[30] The nature of tribal funds is discussed in Chapter 15; the right of the individual to share in tribal funds is discussed in Chapter 9. On administrative power over tribal funds, see Chapter 5, sec. 10, and over individual funds, see *ibid.*, sec. 12. On regulations regarding moneys, tribal and individual, see 25 C. F. R. 221.1–233.7.

[31] See Chapter 9.

By the Act of March 2, 1907,[32] Congress provided generally for the distribution of tribal funds among individuals. Those Indians whom the Secretary of the Interior believed capable of managing their affairs could have placed to their credit upon the books of the United States Treasury their pro rata share of the tribal funds held in trust by the United States, and they could draw upon this credit without any further governmental control.[33] Section 2 of the act provided that the Secretary of the Interior might pay to disabled Indians their shares in tribal property, under such rules and conditions as he might prescribe. As later amended[34] this section authorizes the Secretary of the Interior upon application by an Indian "mentally or physically incapable of managing his or her own affairs," to withdraw the pro rata share of such Indian in the tribal funds, and to expend such sums on behalf of the Indian.

Section 28 of the Appropriation Act of May 25, 1918,[35] which specifically excluded from its scope the funds of the Five Civilized Tribes and the Osages, in Oklahoma, authorized the Secretary of the Interior to withdraw tribal funds from the Treasury of the United States and to credit recognized members of the tribe with equal shares. However, this authority was revoked by section 2 of the Act of June 24, 1938.[36] Nevertheless, the Indian may still apply for funds as his pro rata share in tribal assets, under the Act of 1907.[37] The granting of such applications is contrary to the general administrative policy of conserving tribal funds, but in special circumstances such pro rata distributions are still made. It has been held by the Interior Department that, under section 16 of the Act of June 18, 1934,[38] such applications must receive the approval of the tribal council, if the tribe in question is organized under that act.[39]

The individual may be awarded, by special statute, a specified sum from the tribal funds on deposit in the United States Treasury. A typical act is the Act of February 12, 1932,[40] providing for payment of $25 to each enrolled Chippewa of Minnesota from tribal funds, under such regulations as the Secretary of the Interior may prescribe.

In the individualization of tribal funds, Congress has at various times laid down directions under which the Secretary of the Interior should expend the funds.

In the Act of March 3, 1933,[41] Congress provided for the distribution of tribal funds of the Ute Indians. The shares of all were to be deposited as individual Indian moneys[42] and subject to disbursement for the individual's benefit in the following ways: for improving lands, erecting homes, purchase of equipment, livestock, household goods and in other ways as will enable them to become self-supporting. The shares of the aged, infirm, and other incapacitated members were to be used for their support and maintenance. As for minors, their shares might be invested or spent in the same fashion as prescribed for adults, but when their funds were to be invested or expended, the consent of the parents and the approval of the Secretary of the Interior was necessary.[43]

Acts providing for the payment of judgments in favor of a tribe may limit the rights of the Indian in individualized tribal funds by the qualification that "the per-capita share due each member * * * be credited to the individual Indian money account of such member for expenditure in accordance with the individual Indian money regulations."[44] Various resolutions authorizing the distribution of judgments rendered in favor of Indian tribes provide for per capita payments to each enrolled member, such distribution to be made under such rules and regulations as the Secretary of the Interior may prescribe.[45]

By virtue of these acts, Congress has given to the Secretary of the Interior authority over individual funds derived from the tribal property held in trust comparable to the authority over funds derived from the individual's restricted property.[46]

[32] 34 Stat. 1221, 25 U. S. C. 119.
[33] Op. Sol. I. D. M.25258, June 26, 1929.
[34] Amended by Act of May 18, 1916, 39 Stat. 123, 128, 25 U. S. C. 121.
[35] 40 Stat. 561, 591–592.
[36] 52 Stat. 1037.
[37] 34 Stat. 1221.
[38] Memo. Sol. I. D., September 21, 1939.
[39] 48 Stat. 984, 987, 25 U. S. C. 476.
[40] 47 Stat. 49. Acts of similar nature are cited in Chapter 9, sec. 6.
[41] 47 Stat. 1488.
[42] "Individual Indian moneys are funds, regardless of derivation, belonging to individual Indians which come into the custody of a disbursing agent." 25 C. F. R. 221.1. See sec. 8, *infra*, for a discussion of these regulations.
[43] *Cf.*, Act of June 1, 1938, 52 Stat. 605, as amended by sec. 2(b), Act of August 7, 1939, Pub. No. 325, 76th Cong., 1st sess. (Klamath).
[44] Joint Resolution, June 20, 1936, 49 Stat. 1569, authorizing distribution of judgment in favor of Gros Ventre Indians among enrolled members.
[45] The Joint Resolution of June 20, 1936, 49 Stat. 1568, provides for a per capita payment of $85, and places the remainder of the fund awarded to the Blackfeet Tribe at the disposal of the tribal council and the Secretary of the Interior.
Under the Joint Resolution of April 29, 1930, 46 Stat. 260, the Secretary of the Interior is authorized to pay a judgment in favor of the Iowa Tribe to members of the tribe in pro-rata shares. The competent members receive their entire shares in cash; the shares of the others, including minors, are deposited to the individual credit of each and subject to existing laws governing Indian moneys.
The right of the Chippewa allottee on the Lac du Flambeau Reservation to the proceeds derived from the sale of tribal timber is controlled by the Act of May 19, 1924, 43 Stat. 132. After providing for the sale under rules and regulations prescribed by the Secretary of the Interior, the act states that the net proceeds are to be distributed per capita. Those whom the Secretary shall deem competent to handle their own affairs shall receive their shares. As for the others, their shares are deposited to their individual credit and paid to them or used for their benefit under the Secretary's supervision.
[46] See Chapter 5, secs. 11 and 12.

SECTION 5. SOURCES OF INDIVIDUAL PERSONAL PROPERTY—PAYMENTS FROM THE FEDERAL GOVERNMENT

A third source of individual personalty comprises the various forms of direct payment to individual Indians from the Federal Government. In this connection a distinction must be drawn between obligations assumed by the Federal Government towards the various tribes, by reason of the sale of tribal lands or otherwise, and obligations running directly to the members of the tribes. Problems arising out of the former situation are dealt with elsewhere.[47] For the present we are concerned only with the situations in which the Federal Government has undertaken to make payments, in money or goods, to individual Indians.

Gifts were sometimes made for the purpose of civilizing the Indians by giving them agricultural aids and clothes.[48] Gifts

[47] See Chapters 9 and 15.

[48] The Act of March 30, 1802, sec. 13, 2 Stat. 139, 143, provides in part:

> That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper * * *.

In the Appropriation Act of March 3, 1875, 18 Stat. 420, are numerous appropriations for agricultural pursuits. Miamies of Kansas are given

percent of all Indian lands and 35 percent of the allotted lands.

[26] Sec. 1 prohibits further allotment, but by sec. 18 the whole act may be rejected by a negative vote of a majority of eligible voters of a band or tribe.
[27] Sec. 4.

These heirship tracts are potentially one of the most important of the Indian resources. (P. 15.)

The present Federal policy and objectives relating to Indian land have recently been stated in a Handbook of Indian Land Policy and Manual of Procedures prepared by the Office of Indian Affairs.[176]

By exchange of allotments for assignments the problem of the sale and partition of inherited lands is finding a solution and the federal Indian land policy is being carried forward. Section 5 of the Act of June 18, 1934,[177] has provided for the acquisition of land by the Secretary of the Interior for an Indian tribe, through purchase, gift, exchange, or assignment, or through relinquishment of land by individual Indians. It has been held that the purpose of "providing land for Indians" is served by an exchange transaction whereby an individual Indian transfers allotted land to the tribe in exchange for an assignment of occupancy rights in the same or in another tract, since the tribe through this transaction acquires a definite interest in the land over and above the transferor's retained occupancy right.[178] By means of this exchange provision the tribe may acquire Indian allotments or heirship lands and may designate various parcels of tribal land which are not needed for any tribal enterprise as available for exchange. Where a tribe has funds in its tribal treasury or in the United States Treasury, it may decide to use a portion of such funds to buy up lands from Indians who have holdings in the area under consideration. Where the land is in heirship status, if the tribe and all the heirs are unable to agree among themselves on the terms of purchase, the Secretary of the Interior may prescribe the method of sale and valuation.

There is no reason why a tribe may not purchase allotted lands in heirship status where such lands are offered for sale by the Secretary of the Interior. The mechanics of such a transaction are set forth in a memorandum of the Solicitor of the Department of the Interior [179] in the following words:

> It will be noted that section 372 of United States Code, title 25, requires that upon completion of the payment of the purchase price a patent in fee shall issue to the purchaser. Does this requirement make impossible sales to individual Indians, to Indian tribes, or to the Secretary of the Interior in trust for such tribes or individuals?
>
> So far as direct sales to Indian tribes are concerned, there is nothing to prevent the issuance of a patent in fee to an Indian tribe. The issuance of patents to an Indian tribe is provided for by the following statutes: Act of January 12, 1891 (26 Stat. 762), providing for patents to Mission Bands; treaty with Cherokees, December 29, 1835 (7 Stat. 478) granting land to Cherokee Nation.
>
> After issuance of such patent, however, an organized tribe might, under section 5 of the act of June 18, 1934, surrender legal title to the land, if it so chose, to the United States, retaining equitable ownership of the land. A tribe not within the provisions of that act could not surrender such legal title.
>
> * * * * *
>
> The necessity for issuance of a fee patent which arises when heirship land is sold by the Secretary of the Interior, does not arise where the conveyance of land is made by all the interested heirs. Such conveyance, made on a restricted deed form, conveys only the same interest as is held by the heirs.
>
> The question of issuing fee patents to Indian purchasers of land does not arise on reservations subject to the act of June 18, 1934, since on such reservations direct sales to individual Indians are prohibited. A related question, however, arises with respect to sales of land to the United States in trust for a tribe or individual Indian under the provisions of section 5 of the said act, which authorizes the Secretary of the Interior,
>
> > "to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."
>
> The statute in question specifically provides, with respect to the tenure of lands so acquired:
>
> > "Title to any lands or rights acquired pursuant to this act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

[176] The primary object of Indian land policy is to save and to provide for the Indian people adequate land, in such a tenure and in accordance with such proper usage that they may subsist on it permanently by their own labor.

Indian land policy shall have for its purpose the organization and consolidation of Indian lands into proper units, considering the use to be made of the land, the type of labor and capital investment to be applied thereon, and the technical capacities and habits of co-operation of the Indians concerned.

Indian land policy definitely looks toward the substitution of Indian use for non-Indian use of Indian lands.

Implicit in all of the above is the responsibility of affording the Indians the necessary credit and technical training to make possible the best economic use of their lands.

Indian land tenure policy shall be searchingly adapted to various solutions not only as to whole tribes, but also as to natural communities within any particular tribe, and where the facts so indicate, to individual cases.

Indian land policy should take into account and should seek to contribute to the solution of the land policy problems of the Government as a whole.

In the protection and enlargement of an adequate land base, due consideration must be given to the preservation of those Indian cultural, social, and economic values and institutions which have in the past sustained, and are now sustaining, their economic and spiritual integrity and which may hold important possibilities for the future.

Indian land policy shall seek the most rapid possible reduction of uneconomic and nonproductive administrative expenditures, particularly in connection with the management of heirship lands.

In view of the limited amount of funds available for the enlargement of the Indian land base, preference in the application of these funds shall be given to those reservations showing a readiness to cooperate in order to secure the advantages, and to those showing a critical shortage of resources; and within these reservations, preference shall be given to those communities definitely Indian in character.

In the process of simplifying the ownership pattern on Indian reservations, tribal funds, IRA land-acquisition appropriations, or other applicable funds may be used (in default of other and preferable methods) for the consolidation of Indian-owned lands whenever such use supplies an essential element in improving the economy of the tribe, and reducing costs of administration.

The acquisition of land for Indians shall be for Indian use and upon adequate evidence that it will be used by Indians. In all cases where it is practicable, the acquisition should be carried out in response to the request of the Indians and upon evidence furnished by them of their determination to use the land.

Funds accruing to tribes from the past or present disposal of capital assets shall be used to the largest feasible extent for the creation of new productive resources. (Handbook, *supra*, Pt. III (1938), pp. 1–3.)

[177] 48 Stat. 984, 25 U. S. C. 465.

[178] Memo Sol. I. D., April 4, 1935.

[179] Memo Sol. I. D., August 14, 1937.

property, which we have noted in the field of realty, are paralleled in the field of personalty.

The distinction between property vested in the tribe as an entity and property held by tribal members in common is likewise repeated in the field of personalty.

The question of who composes the tribe in which personal property is vested does not differ in principle from the parallel question which we have considered in the field of real property.

The problems raised by the concept of "equitable ownership" in tribal realty are repeated with respect to equitable ownership of tribal funds and other personal property.

Possibly a peculiar problem is raised in the field of tribal personalty by the question of when interest is payable on tribal funds helds by the United States, although this problem shows a basic similarity to the problem of the right to the proceeds of land held by the United States in trust for an Indian tribe.

Another problem that may appear peculiar to the field of tribal personalty, but is in fact basically analogous to problems in the field of tribal realty, is that of creditors' claims against tribal funds.

Because of these numerous parallels, it should be possible to deal with the foregoing questions rather briefly, relying upon analyses already made with respect to real property.

A. FORMS OF PERSONAL PROPERTY

The personal property of Indian tribes probably comprises all the forms of personal property known to non-Indians, including bonds, notes, mortgages, moneys, credits, shares of stock, choses in action,[558] and herds.[559]

A tribe may have an equitable interest in personal property held by the United States or by some other party, and, conversely, an Indian tribe may have in its possession funds which it holds as trustee.

Thus a tribe may hold funds as a trustee to carry out projects for the rehabilitation of needy Indians.[560]

Of all forms of property held by an Indian tribe, it is probable that a principal focus of discussion and controversy has been the category of choses in action and, in particular, claims against the United States and against other tribes.[561]

B. TRIBAL PROPERTY AND FEDERAL PROPERTY

As with realty, the distinction between personal property of an Indian tribe and public property of the United States has been recognized in a wide variety of cases.

The distinction between tribal funds and public moneys of the United States was the basis of the decision in *Quick Bear* v. *Leupp*.[562] In that case the Supreme Court held that payments to the Bureau of Catholic Indian Missions for the care, education, and maintenance of Indian pupils was not in violation of statutory provisions which declared it "to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."[563] The Supreme Court said:

> These appropriations rested on different grounds from the gratuitous appropriations of public moneys under the heading "Support of Schools." The two subjects were separately treated in each act, and, naturally, as they are essentially different in character. One is the gratuitous appropriation of public moneys for the purpose of Indian education, but the "Treaty Fund" is not public money in this sense. It is the Indians' money, or at least is dealt with by the Government as if it belonged to them, as morally it does. It differs from the "Trust Fund" in this: The "Trust Fund" has been set aside for the Indians and the income expended for their benefit, which expenditure required no annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum by the act of 1889, 25 Stat. 888, chap. 405. This "Trust Fund" is held for the Indians and not distributed *per capita*, being held as property in common. The money is distributed in accordance with the discretion of the Secretary of the Interior, but really belongs to the Indians. The President declared it to be the moral right of the Indians to have this "Trust Fund" applied to the education of the Indians in the schools of their choice, and the same view was entertained by the Supreme Court of the District of Columbia and the Court of Appeals of the District. But the "Treaty Fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Fund" the debt to the Indians created and secured by the treaty is paid by annual appropriations. They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in installments. We perceive no justification for applying the proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature and having no relation to each other, except that both are technically appropriations. (Pp. 80–81.)

Since the decision in *Quick Bear* v. *Leupp*, the Bureau of Indian Affairs has continued to make payments to sectarian schools out of Indian "trust" or "treaty" funds, at the request of the adult Indians concerned. Justifications for such expenditures have been regularly presented to Congress in hearings on Indian appropriations and regularly approved.[564]

In the case of *United States* v. *Sinnott*,[565] where the United States sought to recover upon an Indian agent's bond by reason of the agent's failure to deposit certain timber sale proceeds in the United States Treasury, the court found for the defendant, on this issue, declaring:

> The mill at which this lumber was sawed was erected by the United States for the Indians of this reservation in pursuance of the treaty with the Umpquas, of November 29, 1854 (10 St. 1125,) and that with the Mollallas, of December 21, 1885, (12 St. 981,) and in fact belongs to them; and therefore, in my judgment, such lumber was not the "property" of the United States, within the purview of section 3618 of the Revised Statutes, which requires the proceeds of any sale thereof to be conveyed into the treasury; nor was the money received therefor, received "for the use of the United States," within the purview of section 3617 of the Revised Statutes. (Pp. 85–86.)

[558] See, for example, Act of June 10, 1872, 17 Stat. 388 (sale of Ottawa tribal assets).

On debts to a tribe created by the appropriation of tribal funds for payment of irrigation construction charges on allotted lands, see Act of June 4, 1920, sec. 8, 41 Stat. 751, 753. See also Act of March 3, 1921, sec. 5, 41 Stat. 1355, and see Chapter 12, sec. 7. To the effect that a tribe may transfer or assign debts owing from the United States on the same basis as a private person, see Assignability of Indebtedness—Cherokee Nation, 20 Op. A. G. 749 (1894).

[559] See, for example, Act of April 27, 1904, 33 Stat. 352, 353 (Crow).

[560] See Letter of Acting Secretary I. D. to United States Employees' Compensation Commission, July 9, 1937, analyzing loans and grants to Indian tribes made pursuant to the Emergency Relief Appropriation Act of April 8, 1935.

> These agreements are known as trust agreements and contain the following significant provisions: The United States grants to the tribe all of the allocation of emergency funds required to cover the cost of the approved projects excepting such part of the cost as represents necessary administrative and supervisory expenses. The grant is made subject to the condition that it will be used for only the approved projects and that the projects will be carried on under the regulations and supervision of the Indian Office.
>
> And see Sec. 24 of this chapter.

[561] See Chapter 14, sec. 6.

[562] 210 U. S. 50 (1908).

[563] Act of June 10, 1896, 29 Stat. 321, 345; Act of June 7, 1897, 30 Stat. 63, 79; similar provisions are found in more recent appropriation acts, e. g., Act of March 2, 1917, 39 Stat. 969, 988.

[564] Op. Sol. I. D., M.27514, August 1, 1933. See Chapter 12, sec. 2.

[565] 26 Fed. 84 (C. C. Ore. 1886).

In a somewhat similar case, the United States Supreme Court declared: [566]

> The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times in equity the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the lands. (P. 693.)

C. TRIBAL OWNERSHIP AND COMMON OWNERSHIP

Tribal funds, like tribal lands, are the property of the tribe as an entity rather than common property of the individual members.[567]

This general rule, however, does not settle the question of when a particular treaty or statute is to be construed as establishing tribal property rights in a given fund, for instance, and when individual rights are established. The problem is apt to become acute when the treaty or statute in question refers to "Indians" in the plural instead of to a tribe in the singular.

In the case of *Chippewa Indians of Minnesota* v. *United States*,[568] a possible ambiguity in the original statute [569] requiring payments to "the Chippewa Indians in the State of Minnesota" was resolved by the Supreme Court in view of a sustained course of administrative dealings treating the funds in question as the property of the tribe rather than of individuals.

Ordinarily a treaty promise to make annuity payments to a tribe *per capita* does not establish vested rights in individual members of the tribe, and no such vested right is established by the general statute requiring that payment of annuities be made directly to the Indians rather than to agents or attorneys.[570] Therefore individual members who separate from the tribe forfeit a legal claim to annuities.[571] As was said in the case of *The Sac and Fox Indians*,[572] *per* Holmes, *J.*:

> The Government did not deal with individuals but with tribes. *Blackfeather* v. *United States*, 190 U. S. 368, 377. See *Fleming* v. *McCurtain*, 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes. Treaties of November 3, 1804, 7 Stat. 84; October 21, 1837, 7 Stat. 540; October 11, 1842, 7 Stat. 596. See treaty of October 1, 1859, 15 Stat. 467. (P. 484.)
>
> * * * * *
>
> The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867. It confined its benefits to "original Sacs and Foxes now in Iowa," and made the Secretary of the Interior the judge. (Pp. 489–490.)

D. TRIBAL INTEREST IN TRUST PROPERTY

Numerous statutes refer to funds held by the United States for an Indian tribe as "trust funds" and to the Secretary of the Treasury or the Secretary of the Interior as "custodian." [573]

The strict language of "trust" is not, however, necessary to establish a trust relationship between the United States and the tribe where tribal personal property is held by the United States.

Incidents of the trust or depositary relationship are found in statutes providing for payments out of the Treasury to replace bonds held by the Secretary of the Interior for an Indian tribe and stolen while in his custody,[574] or to compensate for the defaults of states on state bonds.[575]

E. THE COMPOSITION OF THE TRIBE

As has been already noted, the question of what individuals are entitled to share in tribal personal property does not differ essentially from the parallel question considered with respect to realty.[576] The chief difficulties with respect to the proper distribution of tribal funds have arisen in connection with the amalgamation of distinct tribes,[577] the splitting of single tribes,[578] and the loss of membership by or adoption of particular individuals.

Where several tribes or bands are interested in a single fund, Congress has sometimes provided for distribution in accordance with respective numbers.[579]

The interest of the various groups of Cherokees in national funds has been a source of legislation [580] and litigation [581] for many years.

Special statutes occasionally provide for the payment of shares of tribal funds to persons newly added to tribal rolls.[582]

F. INTEREST ON TRIBAL FUNDS

When tribal funds are held by the United States for the benefit of the tribe, the question frequently arises whether interest on such funds is due to the tribe and, if such be the case, what the appropriate rate of interest may be. Ordinarily this question must be answered by reference to the terms of the treaty, act

[566] *United States* v. *Brindle*, 110 U. S. 688 (1884).

[567] *Dukes* v. *Goodall*, 5 Ind. T. 145 (1904) (holding individual Choctaw has no such interest in tribal property as will justify representative suit to prevent improper additions to tribal rolls); Seminole Indians—Modification of Agreement With, 26 Op. A. G. 340 (1907); see *Parks* v. *Ross*, 11 How. 362, 374 (1850). And *cf. Muskrat* v. *United States*, 219 U. S. 346 (1911), rev'g 44 C. Cls. 137 (1909) (holding unconstitutional provision in the Appropriation Act of March 1, 1907, 34 Stat. 1015, 1028, conferring jurisdiction upon the Court of Claims and the Supreme Court to determine the constitutionality of the Act of April 26, 1906, 34 Stat. 137, as amended by Act of June 21, 1906, 34 Stat. 325, adding new members to Cherokee rolls).

[568] 307 U. S. 1 (1939).

[569] Act of January 14, 1889, 25 Stat. 642.

[570] Act of August 30, 1852, sec. 3, 10 Stat. 41, 56.

[571] *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma*, 220 U. S. 481 (1911), aff'g. 48 C. Cls. 287 (1910).

[572] *Ibid.*

[573] Act of June 10, 1876, 19 Stat. 58; Act of June 16, 1880, sec. 2, 21 Stat. 291, 292 (Great and Little Osage).

[574] Act of July 12, 1862, sec. 1, 12 Stat. 539, 540 (Kaskaskias, Peorias, Piankeshaws, and Weas).

[575] Thus the Act of March 3, 1845, 5 Stat. 766, 777, includes an appropriation "To make good the interest on investments in State stocks and bonds, for various Indian tribes, not yet paid by the States, to be reimbursed out of the interest when collected * * *." Act of August 31, 1842, 5 Stat. 576 (Wyandott).

[576] Sec. 1, *supra*.

[577] See *e. g.*, Act of January 19, 1891, 26 Stat. 720 (division of Sioux Nation).

[578] See *e. g.*, Treaty of July 19, 1866, with Cherokee Nation, 14 Stat. 799 (incorporation of friendly tribes).

[579] Treaty of July 27, 1853, with Comanche, Kiowa, and Apache Indians, Art. 6, 10 Stat. 1013, 1014; Act of January 18, 1881, sec. 3, 21 Stat. 315, 316 (Winnebago); *cf.* Treaty of August 25, 1828, Art. 2, 7 Stat. 315, 316 (Winnebago, Potawatomie, Chippewa, and Ottawa Indians); *cf.* also Act of March 2, 1889, sec. 2, 25 Stat. 1013, 1015 (United Peorias and Miamies).

[580] See Act of August 7, 1882, 22 Stat. 302, 328; Act of March 3, 1883, 22 Stat. 582, 585–586; Act of August 23, 1894, 28 Stat. 424, 441, 451.

[581] *Cherokee Nation* v. *Blackfeather*, 155 U. S. 218 (1894); *Cherokee Nation* v. *Journeycake*, 155 U. S. 196 (1894), aff'g. *Journeycake* v. *Cherokee Nation*, 28 C. Cls. 281 (1893).

[582] Act of June 2, 1924, 43 Stat. 253 (Cheyenne and Arapaho).

of Congress, or agreement by which the fund in question was established.[588]

Under some treaties what amounted to interest payments were designated "annuities."[589]

The Act of April 1, 1880,[590] authorized the Secretary of the Interior to deposit such funds in the United States Treasury, in lieu of investment, with a provision that interest should be payable "semiannually * * * at the rate per annum stipulated by treaties or prescribed by law." The Act of February 12, 1929,[591] as amended by the Act of June 13, 1930,[592] provides for the payment of simple interest at the rate of 4 per centum per annum on tribal funds, "upon which interest is not otherwise authorized by law."[593]

When tribal funds held by the United States were segregated for pro rata distribution and deposited in banks, section 28 of the Act of May 25, 1918,[594] required as a condition of the deposit that the bank agree to pay interest on such funds "at a reasonable rate." Subsequently, section 324 (c) of the Banking Act of 1935[595] prohibited payment of interest by member banks of the Federal Reserve System on demand deposits, and repealed "so much of existing law as requires the payment of interest with respect to any funds deposited by the United States * * * as is inconsistent with the provision of this section as amended." It was administratively determined that this statute superseded the requirement of interest payment on funds on demand deposit in such banks, and that such funds might lawfully be deposited in banks not paying interest thereon.[596] This holding was limited to banks which are members of the Federal Reserve System,[597] and had no application to tribal funds not segregated for pro rata distribution, as to which a fixed interest is due to the tribe.

The Act of June 24, 1938,[598] authorized the Secretary of the Interior to withdraw from the United States Treasury and to deposit in banks tribal funds "on which the United States is not obliged by law to pay interest at higher rates than can be procured from the banks."

Although the right of an Indian tribe to interest in connection with recovery against the United States is beyond the scope of this chapter, we may note the general rule laid down by Taft, *C. J.*, in *Cherokee Nation* v. *United States*,[599] based upon section 177 of the Judicial Code:

> * * * we should begin with the premise, well established by the authorities, that a recovery of interest against the United States is not authorized under a special Act referring to the Court of Claims a suit founded upon a contract with the United States unless the contract or the act expressly authorizes such interest.[600]

G. CREDITORS' CLAIMS

The question of whether funds due to or held in trust for the tribe by the United States should be subjected to the claims of creditors has been expressly covered in a number of special statutes relating to the disposition of such funds.[601] In a few cases general payment by the Secretary of the Interior to all of the creditors of a given tribe is authorized, but generally the statute authorizes payment of a designated claim, based either upon tribal agreement,[602] or upon depredations.[603] General legislation on depredation claims authorized the Court of Claims to adjudicate such claims in suits against the United States, with permission to interested Indians to appear as parties defendant.[604] Judgments rendered against Indian tribes were to be satisfied out of annuities, other funds, or any appropriations for the benefit of the tribe, and, if all these sources failed, from the Treasury of the United States, such payments to be reimbursable out of future tribal annuities, funds, or appropriations. Thereafter the regular appropriation acts authorized the Secretary of the Interior to make payments to successful claimants under the Act of March 3, 1891, by deducting such sums from tribal funds, having due regard for the educational and other necessary requirements of the tribe or tribes affected.[605]

The general rule is that tribal funds held by the United States will not be subjected to claims of third parties unless payment of such claims is clearly authorized by statute or treaty,[606] or by lawful action of the tribe itself.[607]

[588] See Crow Indians of Montana, Modification of Agreement, 20 Op. A. G. 517 (1893).

[589] *United States* v. *Blackfeather*, 155 U. S. 180 (1894), revg. *Blackfeather* v. *United States*, 28 C. Cls. 447 (1893); but *cf. Sioux Indians* v. *United States*, 277 U. S. 424 (1928), affg. 58 C. Cls. 302 (1923).

[590] 21 Stat. 70, 25 U. S. C. 161.

[591] 45 Stat. 1164.

[592] 46 Stat. 584.

[593] Sec. 2 of this act fixes the same interest rate for "Indian Money, Proceeds of Labor" accounts over $500 (25 U. S. C. 161b). Secs. 3 and 4 relate to accounting and to deposit of accrued interest. (25 U. S. C. 161c, 161d).

[594] 40 Stat. 591.

[595] 49 Stat. 684, 714–715.

[596] Op. Sol. I. D., M.28231, March 12, 1936.

[597] Op. Sol. I. D., M.28519, May 27, 1936.

[598] 52 Stat. 1037.

[599] 270 U. S. 476, 487 (1926).

[600] For an example of such expression see *United States* v. *Blackfeather*, 155 U. S. 180 (1894), revg. *Blackfeather* v. *United States*, 28 C. Cls. 447 (1893), (holding that where interest is due on the proceeds of land ceded by the tribe, to be sold by the Federal Government in public sale, and such lands are actually sold at private sale at lower price than that designated, and subsequently, under a special jurisdictional act, it is adjudicated that the tribe is entitled to the difference, the tribe is also entitled to interest thereon; the case being brought within the exception to the rule above cited, by a treaty provision for the payment of "five per centum on the amount of said balance, as an annuity.") (P. 188.)

[601] Act of June 22, 1854, 10 Stat. 781 (Sac and Fox); Act of June 16, 1880, 21 Stat. 259, 277 (Cheyenne). Act of May 16, 1874, sec. 1, 18 Stat. 47 (Sioux).

[602] Act of August 5, 1882, 22 Stat. 728 (Kansas); Act of April 4, 1888, 25 Stat. 79 (Pottawatomie); Act of May 27, 1902, 32 Stat. 207 (Menominee).

[603] Act of March 3, 1883, 22 Stat. 804, 805 (Cheyenne and Arapaho); Act of March 3, 1885, 23 Stat. 478, 498 (Cheyenne and Arapaho).

[604] Act of March 3, 1891, 26 Stat. 851. For a discussion of the responsibility of tribes for depredations, see Chapter 14, secs. 1, 6.

[605] Act of August 23, 1894, 28 Stat. 424, 476; Act of June. 8, 1896, 29 Stat. 267, 306; Act of February 9, 1900, 31 Stat. 7, 26; Act of February 14, 1902, 32 Stat. 5, 27.

[606] Claim of Board of Foreign Missions under Treaty with the Cherokees, 5 Op. A. G. 268 (1850); The Cherokee Fund Not Liable for Damages, etc., 3 Op. A. G. 431 (1839); Transfer of Stocks from the Chickasaw to the Choctaw Fund, 3 Op. A. G. 591 (1840).

[607] To the effect that a tribe may assume collective responsibility for debts incurred by individual members, and that the President, at the request of the tribe, may turn annuity funds over to the creditor, see: Contracts of the Potawatomie Indians, 6 Op. A. G. 49 (1853); Contracts of Indians, 6 Op. A. G. 462 (1854).

SECTION 23. TRIBAL RIGHT TO RECEIVE FUNDS

The right of an Indian tribe to receive funds or other personal property from the United States or from third parties depends, of course, upon the language of the treaty, statute, or agreement, in which such promise of payment appears.[608] In this section we shall attempt to determine the principal sources of tribal rights to income, and to analyze the manner in which such payments are handled.

[608] The right of an Indian tribe to recover funds, apart from agreement, by reason of torts committed against it, is treated elsewhere, in Chapter 14. The right to compensation under eminent domain proceedings is adverted to in sec. 11, *supra*. Powers with respect to taxes and fees are treated in Chapter 7.

A. SOURCES OF TRIBAL INCOME

The principal source of tribal income, at least since the Revolution, has been the sale of tribal resources—chiefly land, timber, minerals, and water power. Since sale of such resources was, for more than a century, largely restricted to the United States, most of the tribal income received prior to 1891, when the first general leasing law was enacted,[604] was paid to the tribe by the United States. Failure to appreciate the basis of such payments helped to create the popular misimpression that all payments made by the United States to Indians were matters of charity. An illustration of this sentiment is found in section 3 of the Act of June 22, 1874,[605] which provides that able-bodied male Indians receiving supplies pursuant to appropriation acts should perform useful labor "for the benefit of themselves or of the tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered."

The popular outcry that would have followed the application of a similar rule to white holders of Government bonds or pensions may well be imagined.

It is important to recognize that funds due to Indian tribes under treaties and agreements were viewed by the Indians either as commercial debts for value received or as indemnities due from a foe in war. The fact that such payments were otherwise viewed by the public and by many administrators helps to explain some of the bitter controversies which formerly were decided on the field of battle and are now decided in the Court of Claims.

In numerous treaties, agreements, and statutes, the United States has agreed to pay money to an Indian tribe, in consideration of land cessions or other disposition of Indian property.[606] Where the tribal organization permitted, provision was frequently made that payment should go directly to the treasurer of the tribe; in other cases payments were to be made to chiefs, or to heads of families, or per capita to all adults; in some cases payment was to be made in goods or services.[607]

Many of the early treaties provided for payments to be made in goods.[608]

Ordinarily payments promised in a treaty and paid in annual installments called annuities[609] were due to the tribe, and like obligations of one nation to another, were deemed satisfied when the tribal authorities had received the funds in question.[610] For the United States to have presumed to satisfy its obligation by direct payment to the individual members of the tribe would have been a departure from the canons of international law to which the Federal Government was trying to assimilate its relationship with the Indian tribes. Furthermore, payments to tribal authorities sometimes led to worse dissatisfactions on the part of individual members of the tribes who considered themselves discriminated against, and so the practice grew up of reserving to the United States, by treaty provision, the right to distribute to the members of the tribe the moneys or goods owing to the tribe.[611] Occasionally the treaty provided that this distribution was to be made on the basis of an agreement between the tribal authorities and the agents of the Federal Government.[612]

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[604] See sec. 19, *supra*.

[605] 18 Stat. 146, 176; reenacted as permanent legislation in sec. 3 of the Act of March 3, 1875, 18 Stat. 420, 449, 25 U. S. C. 137. See Chapter 4, sec. 10, Chapter 12, sec. 4.

[606] Art. 4 of Treaty of November 7, 1825, with Shawnee tribe, 7 Stat. 284, 285; Art. 4 of Treaty of October 27, 1832, with Potowatomies, 7 Stat. 399, 401; Art. 3 of Treaty of September 10, 1853, with Rogue River tribe, 10 Stat. 1018, 1019; Art. 3 of Treaty of May 12, 1854, with Menomonee tribe, 10 Stat. 1064, 1065; Art. 6 of Treaty of May 30, 1854, with Kaskaskia and Peoria and Piankeshaw and Wea tribes, 10 Stat. 1082, 1083; Art. 3 of Treaty of June 5, 1854, with Miami tribe, 10 Stat. 1093, 1094; Art. 4 of Treaty of September 30, 1854, with Chippewa Indians of Lake Superior and the Mississippi, 10 Stat. 1109, 1110; Arts. 3 and 4 of Treaty of September 3, 1839, with Stockbridge and Munsee tribes, 11 Stat. 577, 578; Art. 7 of Treaty of August 7, 1856, with Creek and Seminole tribes, 11 Stat. 699, 702; Art. 3 of Treaty of March 10, 1865, with Ponca tribe, 14 Stat. 675, 676; Art. 46 of Treaty of April 28, 1866, with Choctaws and Chickasaws, 14 Stat. 769, 780; Art. 11 of Treaty of October 1, 1859, with Sacs and Foxes of the Mississippi, 15 Stat. 467, 470; Treaty of February 23, 1867, with Senecas, mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Miamies, Ottawas of Blanchard's Fork and Roche de Boeuf, and certain Wyandottes, 15 Stat. 513; Act of April 15, 1874, 18 Stat. 29 (Seminoles); Act of February 19, 1875, 18 Stat. 330, 331 (Seneca Nation); Act of March 3, 1875, 18 Stat. 402, 413 (Choctaws); Act of February 28, 1877, 19 Stat. 265 (Cherokees); Act of June 16 1880, 21 Stat. 238, 248 (Cherokee Nation); Act of July 7, 1884, 23 Stat. 194, 212 (Creek Nation); Act of March 1, 1889, 25 Stat. 757, 758 (Muscogee or Creek Nation); Act of August 19, 1890, 26 Stat. 329 (Omaha tribe); Act of February 13, 1891, 26 Stat. 749, 752 (Sac and Fox and Iowa); Joint Resolution of March 31, 1894, 28 Stat. 579, 580 (Cherokee Nation); Act of February 7, 1903, 32 Stat. 803 (Colville Indian Reservation); Act of August 26, 1922, 42 Stat. 832 (Agua Caliente Band).

[607] On the scope of obligations thereby assumed by the United States, see *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275, 281 (1920); and *cf. United States* v. *Seminole Nation*, 299 U. S. 417 (1937).

[608] See Chapter 3, sec. 3C(3).

[609] Although it has long been the custom to make new appropriations each year, Congress has made appropriations to Indian tribes payable over extended periods. Act of April 21, 1806, 2 Stat. 407; Act of March 3, 1819, 3 Stat. 517 ("annually, for ever"); Act of January 9, 1837, 5 Stat. 135; Act of March 3, 1811, 2 Stat. 660 ("five hundred dollars * * * to be paid annually to the said nations; which annuities shall be permanent").

[610] This was so self-evident that most of the early treaties did not mention the fact. A few treaties, however, did make explicit the understanding that distribution of payments made to the tribe was to be in the hands of the tribal authorities: Treaty of September 3, 1836, with the Menomonie Nation of Indians, 7 Stat. 506; Treaty of February 22, 1855, with the Mississippi bands of Chippewa Indians, 10 Stat. 1165. Other treaties emphasized this understanding, without making it explicit, by providing that the United States reserve the right to apportion annuities among the different bands or tribes with which a single treaty was made, but reserving no similar right to apportion funds within a band or tribe: Treaty of July 27, 1853, with the Comanche, Kiowa, and Apache tribes or nations of Indians, 10 Stat. 1013; Treaty of September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, 10 Stat. 1109.

[611] At first these treaties provided simply that the United States might "divide the said annuity amongst the individuals of the said tribe," Treaty of December 30, 1805, with the Piankeshaw, 7 Stat. 100. In the Treaty of January 8, 1821, with the Choctaw, 7 Stat. 210, per capita distribution is promised in order to remove "any discontent which may have arisen in the Choctaw Nation, in consequence of six thousand dollars of their annuity having been appropriated annually, for sixteen years, by some of the chiefs, for the support of their schools." Other treaties promising equal distribution are: Treaty of October 4, 1842, with the Chippewa Indians of the Mississippi and Lake Superior, 7 Stat. 591; Treaty of January 4, 1845, with the Creek and Seminole Tribes of Indians, 9 Stat. 821; Treaty of March 17, 1842, with the Wyandott Nation of Indians, 11 Stat. 581. Later treaties generally reserved a more comprehensive right in the President of the United States to determine how moneys due to the Indian tribe should be paid to the members of the tribe or expended for their use and benefit: Treaty of March 16, 1854, with the Omaha tribe of Indians, 10 Stat. 1043; Treaty of May 6, 1854, with the Delaware tribe of Indians, 10 Stat. 1048; Treaty of June 5, 1854, with the Miami tribe of Indians, 10 Stat. 1093; Treaty of October 17, 1855, with the Blackfoot and other tribes of Indians, 11 Stat. 657; Treaty of January 22, 1855, with the Dwamish and other tribes of Indians in Territory of Washington, 12 Stat. 927; Treaty of January 26, 1855, with the S'Klallams, 12 Stat. 933; Treaty of January 31, 1855, with the Makah tribe of Indians, 12 Stat. 939; Treaty of June 25, 1855, with the Confederated tribes of Indians in Middle Oregon, 12 Stat. 963; Treaty of July 1, 1855, with Qui-nai-elt and Quil-leh-ute Indians, 12 Stat. 971; Treaty of February 18, 1861, with the Confederated tribes of Arapahoe and Cheyenne Indians, 12 Stat. 1163; Treaty of March 6, 1865, with the Omaha Tribe of Indians, 14 Stat. 667; Treaty of September 29, 1865, with the Great and Little Osage Indians, 14 Stat. 687; Treaty of March 2, 1868, with the Ute Indians, 15 Stat. 619.

[612] See, for example: Treaty of September 29, 1837, with the Sioux Nation of Indians, 7 Stat. 538; Treaty of October 18, 1848, with the

Generally such per capita payments comprised only a portion of the funds due to the tribe, the remainder of such funds being invested or expended in other ways.[612] Occasionally an Indian treaty provided for complete per capita distribution of tribal funds.[614] Since 1871, and particularly during the years following the General Allotment Act, when per capita distribution of property was looked upon as an effective means of destroying tribal organization, numerous statutes provided for per capita payment of tribal funds.[615]

In recent decades compensation to Indian tribes for land or other property has generally taken the form of statutory provisions requiring that certain sums be placed "to the credit of" a given tribe.[616] Frequently specific provision is made covering the interest to be paid upon the fund and covering also the purposes for which and the manner in which the fund may be expended. Where a tribe has several different funds to its credit the statute, if clearly drafted, specifies the particular fund to which the sum in question is to be added.

Some statutes merely provide that funds shall be deposited in the United States Treasury and be subject to appropriations by the Congress for a designated group or tribe of Indians.[617]

Since 1847 the President has been empowered, in his discretion, to pay over moneys due to Indian tribes to the members thereof, per capita, instead of to the officers or agents of the tribe.[618] Questions of interpretation, however, continued to arise even after the 1847 statute.

Where the manner of payment is in issue it has been said that a requirement of execution of a receipt or release by the tribe indicates that payment to tribal officers rather than heads of families is intended.[619]

Again, it has been said:

> Ordinarily a debt due to a nation, by a treaty, ought to be paid to the constituted authorities of the nation; but where the treaty and the law appropriating the money both direct the payment to all the individuals of the nation *per capita*, the treaty and the statute must prevail.[620]

The statutes dealing with payments due from the United States to Indian tribes represented, until the end of the nineteenth century, the chief source of tribal income, supplemented only sporadically by special statutes or treaties authorizing the leasing or sale of tribal lands to other Indian tribes[621] or to non-Indians.

A further source of income of considerable importance during recent decades is constituted by judgment awards in suits against the United States.

In recent years, various jurisdictional acts have provided that no part of the judgment that may be awarded pursuant to the act shall be paid out in per capita payments to the Indians concerned.[622]

This proviso represents a well-established tendency to devote recoveries from judgments in claim cases to the rebuilding of the entire tribal estate rather than to temporary payments which are easily dissipated.

An important source of income due to Indian tribes from non-governmental sources developed with the building of railroads across Indian reservations.[623]

Most of the statutes which grant rights-of-way to railroads or other transportation or communication companies provide for payment of compensation to the Indian tribe. A majority of the statutes relating to railroads contain the phrase "that the

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Menomonee Tribe of Indians, 9 Stat. 952; Treaty of May 10, 1854, with the Shawnees, 10 Stat. 1053; Treaty of June 19, 1858, with the Mendawakanton and Wahpakoota bands of the Sioux tribe of Indians, 12 Stat. 1031; Treaty of June 19, 1858, with the Sisseeton and Wahpaton bands of Sioux tribe of Indians, 12 Stat. 1037.

[612] Treaty of January 14, 1837, with Saganaw Chippewas, 7 Stat. 528; Treaty of October 21, 1837, with Sacs and Foxes, 7 Stat. 540; Treaty of October 19, 1838, with Ioways, 7 Stat. 568; Treaty of August 5, 1851, with Bands of Dakotas, 10 Stat. 954; Treaty of March 15, 1854, with Ottoes and Missourias, 10 Stat. 1038; Treaty of May 10, 1854, with Bands of Shawnees, 10 Stat. 1053; Treaty of April 19, 1858, with Yancton Sioux, 11 Stat. 743.

[614] Treaty of January 31, 1855, with Wyandott Tribe, 10 Stat. 1159.

[615] Act of March 3, 1881, sec. 5, 21 Stat. 414, 433–434; Act of May 15, 1888, sec. 1, 25 Stat. 150 (Omahas); Act of July 4, 1888, 25 Stat. 240 (Winnebago Reservation); Act of October 19, 1888, 25 Stat. 608 (Cherokee); Act of June 6, 1900, sec. 1, 31 Stat. 672, 673 (Fort Hall Reservation); Act of March 1, 1901, 31 Stat. 848, 859 (Cherokee); Act of March 1, 1901, 31 Stat. 861, 870 (Creek); Act of June 30, 1902, 32 Stat. 500, 503 (Creek); Act of March 3, 1909, 35 Stat. 751 (Quapaw); Act of June 25, 1910, sec. 21, 36 Stat. 855, 861 (Sisseton and Wahpeton); Joint Resolution of August 22, 1911, 37 Stat. 44; Act of April 18, 1912, 37 Stat. 86 (Osage Tribe); Act of May 11, 1912, sec. 3, 37 Stat. 111 (Omaha Tribe); Act of June 4, 1920, sec. 11, 41 Stat. 751, 755 (Crow); Act of March 3, 1921, 41 Stat. 1249 (Osage); Act of June 4, 1924, 43 Stat. 376 (Eastern Band of Cherokees).

[616] Act of December 15, 1874, 18 Stat. 291, 292 (Eastern band of Shoshones); Act of April 10, 1876, sec. 3, 19 Stat. 28, 29 (Pawnee tribe); Act of April 25, 1876, sec. 2, 19 Stat. 37 (Menomonee Indians); Act of August 15, 1876, sec. 4, 19 Stat. 208 (Otoe and Missouria and Sac and Fox of the Missouri tribes); Act of June 28, 1879, 21 Stat. 40, 41 (Osage Indians); Act of March 3, 1881, sec. 4, 21 Stat. 380, 381 (Otoe and Missouria Tribes); Act of March 3, 1885, sec. 3, 23 Stat. 340, 343 (Cayuse, Walla-Walla, and Umatilla Indians); Act of March 3, 1885, sec. 4, 23 Stat. 351, 352 (Sac and Fox and Iowa Indians); Act of September 1, 1888, sec. 6, 25 Stat. 452, 455 (Shoshone and Bannack tribes); Act of January 14, 1889, sec. 7, 25 Stat. 642, 645 (Chippewas); Act of June 12, 1890, sec. 3, 26 Stat. 146, 147 (Menomonees); Act of October 1, 1890, sec. 4, 26 Stat. 658, 659 (Round Valley Indian Reservation); Act of March 3, 1901, 31 Stat. 1455 (Chippewa Indians); Act of June 13, 1902, 32 Stat. 384 (Ute Indian Reservation); Act of August 17, 1911, 37 Stat. 21 (Rosebud Indian Reservation); Act of July 1, 1912, 37 Stat. 186 (Umatilla Indian Reservation); Act of July 10, 1912, 37 Stat. 192 (Flatbead Indians); Act of February 14, 1913, sec. 6, 37 Stat. 675, 677 (Standing Rock Indian Reservation); Act of August 22, 1914, sec. 1, 38 Stat. 704 (Quinaielt Reservation); Act of March 2, 1917, sec. 2, 39 Stat. 994, 995 (Fort Peck Indians); Act of March 3, 1919, 40 Stat. 1320, 1321 (Rosebud Indians); Act of December 11, 1919, sec. 2, 41 Stat. 365, 366 (Fort Peck Indians); Act of May 31, 1924, sec. 1, 43 Stat. 247 (Quinaielt Reservation); Act of February 28, 1925, 43 Stat. 1052 (Chippewa Indians); Act of August 25, 1937, sec. 3, 50 Stat. 811 (Agua Caliente or Palm Springs Band).

[617] Act of June 7, 1924, sec. 1, 43 Stat. 596 (Pyramid Lake Indian Reservation).

[618] Act of March 3, 1847, sec. 3, 9 Stat. 203, amending Act of June 30, 1834, sec. 11, 4 Stat. 735, 737. The 1847 provision was subsequently embodied, with other material, in R. S. § 2086 and 25 U. S. C. 111.

[619] "The direction that the money shall be paid to the Creek nation is not decisive, because payment to the heads of families is a mode of making payment to the nation. But the condition that a release of all claim for the whole sum shall first be executed by the Creek nation, is not equivocal, because such a release could not be executed by the heads of families or by individuals. And when the act directs that the payment shall be made to the Creek nation, and that the release shall be executed by the Creek nation, the inference would seem to be very strong against a distribution *per capita*. But when the act goes one step further, and requires that the persons to whom the money shall be paid shall make satisfactory proof that they have full power and authority to receive and receipt for the same, the inference becomes irresistible against a distribution and payment to heads of families, which would be entirely irreconcilable with this provision." (Pp. 48–49.) Payment of Certain Moneys to the Creeks, 5 Op. A. G. 46, 48–49 (1848). The later portion of this opinion, apparently inconsistent with the above quotation, was revised in 5 Op. A. G. 98 (1849). *Cf.* Payment of Certain Moneys to the Cherokees, 5 Op. A. G. 320 (1851).

[620] Payment of Certain Moneys to the Cherokees, 5 Op. A. G. 320 (1851). Accord: Miami Indians, 6 Op. A. G. 440 (1854) (treaty provision, ambiguous, superseded by statute).

[621] Various early statutes provided for payment by one Indian tribe to another in connection with intertribal land transference. See, for example, Act of June 5, 1872, 17 Stat. 228 (payment by Kansas Tribe to Osage Tribe).

[622] See, for example, Act of March 3, 1931, 46 Stat. 1487 (Pillager Bands of Chippewa Indians). And see Chapter 9, sec. 6, fn. 145.

[623] See secs. 18–20, *supra*.

> Third. To the heads of the families and to the individuals entitled to participate in the moneys or goods.
>
> Fourth. By consent of the tribe, such moneys or goods may be applied directly, under such regulations, not inconsistent with treaty stipulations, as may be prescribed by the Secretary of the Interior, to such purposes as will best promote the happiness and prosperity of the members of the tribe, and will encourage able-bodied Indians in the habits of industry and peace.

Various other early statutes still in force require civil and military officers to certify to the actual delivery of goods owing to Indians,[638] authorize the President to require that payments and deliveries be made by the various superintendents,[639] permit payment of annuities in coin,[640] or goods (at the request of the tribe)[641] authorize Indians 18 years of age or over to receive annuities,[642] require the Secretary of the Interior to designate disbursing officers handling per capita payments,[643] extend these safeguards to the payment of judgment moneys,[644] require the presence of the "original package" when goods are distributed,[645] and require reports as to the status of tribal fiscal affairs generally,[646] reimbursable accounts,[647] and attendance records for the occasions when goods are distributed.[648]

The foregoing statutes are designed primarily to protect the Indians against lax or dishonest officialdom. A separate body of legislation is directed against immorality on the part of the Indians.

Section 3 of the Act of March 3, 1847,[649] as it appears today in title 25 of the United States Code, provides:

> § 130. Withholding of moneys or goods on account of intoxicating liquors. No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country.

The Act of March 2, 1867,[650] still in force, forbids the payment of treaty funds to an Indian tribe which, since the last distribution of funds, "has engaged in hostilities against the United States, or against its citizens * * *." The Act of April 10, 1869, also still in effect, forbids delivery of goods pursuant to treaty to chiefs who have violated a treaty.[651]

We have already noted that the Act of June 22, 1874,[652] required the beneficiaries of obligations from the United States to perform useful labor in order to secure the sums or supplies owing them. At various times provisions were made that tribes at war with the United States should not receive annuities or appropriations. Thus, section 2 of the Appropriation Act of March 3, 1875,[653] provided:

> That none of the appropriations herein made, or of any appropriations made for the Indian service, shall be paid to any band of Indians or any portion of any band while at war with the United States or with the white citizens of any of the States or Territories. (P. 449.)

Section 1 of the same act, now embodied in the United States Code as section 129 of title 25, provides:

> The Secretary of the Interior is authorized to withhold from any tribe of Indians who may hold any captives other than Indians, any moneys due them from the United States until said captives shall be surrendered to the lawful authorities of the United States.

A third type of statute governing federal payments and distributions is concerned with the issue of tribal payments versus individual payments. During the allotment period a persistent effort was made to individualize annuities and funds, for approximately the same reasons that created the desire to individualize land.

The Appropriation Act of March 3, 1877,[654] contained a direction to each agent having supplies to distribute—

> * * * to make out rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance: *Provided, however*, That the Commissioner of Indian Affairs may, in his discretion, issue supplies for a greater period than one week to such Indians as are peaceably located upon their reservation and engaged in agriculture.

The purpose of this provision was apparently to break down the tribal control that chiefs might exercise through the distribution of food and clothing and to transfer the prestige attached to such offices to the Indian agents.

The Act of March 2, 1907,[655] authorizes the Secretary of the Interior to apportion "tribal or trust funds on deposit in the Treasury of the United States" among the members of the tribe concerned.[656]

General segregation and distribution of tribal funds to members appearing on "final rolls" made by the Secretary of the Interior was authorized by section 28 of the Act of May 25, 1918,[657] and section 1 of the Act of June 30, 1919.[658] The repeal of the distribution features of the latter statute by the Act of June 24, 1938,[659] parallels the termination of the allotment policy.

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[638] Act of June 30, 1934, 4 Stat. 735, 737, R. S. § 2088, 25 U. S. C. 112.

[639] Act of March 3, 1857, sec. 1, 11 Stat. 169, R. S. § 2089, 25 U. S. C. 113.

[640] Act of March 3, 1865, sec. 3, 13 Stat. 541, 561, R. S. § 2081, 25 U. S. C. 114.

[641] Act of June 30, 1834, sec. 12, 4 Stat. 735, 737, R. S. § 2082, 25 U. S. C. 115.

[642] Act of March 1, 1899, sec. 8, 30 Stat. 924, 947, 25 U. S. C. 116.

[643] Act of June 10, 1896, sec. 1, 29 Stat. 321, 336, 25 U. S. C. 117.

[644] Act of March 3, 1911, sec. 28, 36 Stat. 1058, 1077, 25 U. S. C. 118.

[645] Act of April 10, 1869, 16 Stat. 13, 39, R. S. § 2090, 25 U. S. C. 132.

[646] Act of March 3, 1911, sec. 27, 36 Stat. 1058, 1077, 25 U. S. C. 143.

[647] Act of April 4, 1910, sec. 1, 36 Stat. 269, 270, amended June 10, 1921, sec. 304, 42 Stat. 20, 24; 25 U. S. C. 145.

[648] Act of February 14, 1873, 17 Stat. 437, 463, R. S. § 2109, 25 U. S. C. 146.

[649] 9 Stat. 203, R. S. § 2087, 25 U. S. C. 130.

[650] 14 Stat. 492, 515, R. S. § 2100, 25 U. S. C. 127.

[651] 16 Stat. 13, 39, R. S. § 2101, 25 U. S. C. 138.

[652] 18 Stat. 146; made permanent by Act of March 3, 1875, sec. 3, 18 Stat. 449; 25 U. S. C. 137.

[653] 18 Stat. 420.

[654] Sec. 2, 19 Stat. 271, 293.

[655] 34 Stat. 1221, 25 U. S. C. 119. See Chapter 4, sec. 13; Chapter 10, sec. 4.

[656] Sec. 2 of this act provides for payments to helpless Indians, 35 Stat. 1221, amended by Act of May 18, 1916, 39 Stat. 128; 25 U. S. C. 121.

[657] 40 Stat. 561, 591, 25 U. S. C. 162 (segregation of funds). To the effect that the preparation of a "final roll" under congressional direction cannot, in the nature of the case, prevent a later Congress from authorizing a new roll, see Op. Sol. I. D., M.27759, January 22, 1935 (Creek). And see Chapter 4, sec. 14; Chapter 10, sec. 4.

[658] 41 Stat. 3, 9, 25 U. S. C. 163 (enrollment).

[659] 52 Stat. 1037, 25 U. S. C. 162, 162a. See Chapter 4, sec. 16; Chapter 10, sec. 4.

Other miscellaneous statutes relating to the handling of funds due from the United States to Indian tribes relate primarily to matters of accounting procedure and the enforcement of appropriation limitations.[660]

[660] R. S. § 2097, 25 U. S. C. 122 (Limitation on application of tribal funds); Act of May 18, 1916, sec. 27, 39 Stat. 123, 158, 25 U. S. C. A. 123 (Expenditure from tribal funds without specific appropriations); Act of April 13, 1926, 44 Stat. 242, 25 U. S. C. A. 123a (Supp.) (Tribal funds; use to purchase insurance for protection of tribal property); Act of May 9, 1938, sec. 1, 52 Stat. 291, 315, 25 U. S. C. A. 123b (Supp.) (Tribal funds for traveling and other expenses); Act of May 24, 1922, 42 Stat. 552, 575, 25 U. S. C. 124 (Expenditures from tribal funds of Five Civilized Tribes without specific appropriations); Act of June 30, 1919, sec. 17, 41 Stat. 3, 20, 25 U. S. C. 125 (Expenditure of moneys of tribes of Quapaw Agency); R. S. § 2092, 25 U. S. C. 131 (Advances to disbursing officers); Act of March 1, 1907, 34 Stat. 1015, 1016, 25 U. S. C. 134 (Appropriations for supplies available immediately); Act of March 3, 1875, 18 Stat. 420, 450, 25 U. S. C. 135 (Supplies distributed so as to prevent deficiencies); Act of July 1, 1898, sec. 7, 30 Stat. 571, 596, 25 U. S. C. 136 (Commutation of rations and other supplies); Act of March 1, 1907, 34 Stat. 1015, 1016, 25 U. S. C. 139 (Appropriations for subsistence); Act of March 1, 1907, 34 Stat. 1015, 1016, 25 U. S. C. 140 (Diversion of appropriations for employees and supplies); Act of January 12, 1927, sec. 1, 44 Stat. 934, 939, 25 U. S. C. 148 (Supp.) (Appropriations for supplies; transfer to Indian Service supply fund; expenditure).

SECTION 24. TRIBAL RIGHT TO EXPEND FUNDS

Since the United States and the Indian tribe have each an interest in tribal funds held in the Treasury of the United States, the normal method of disposing of such funds has been by common consent of the tribe and the Federal Government. So far as treaty funds are concerned, treaty provisions, many of which are still in force, embodied a common agreement concerning the disposition of tribal money. Following the treaty period, agreements with Indian tribes, ratified by act of Congress, served a similar purpose. In recent years various new formulae have made their appearance embodying, in one way or another, the agreement of the tribe and the United States concerning expenditure of tribal funds.

Judgment moneys awarded to the Blackfeet Indians by the Court of Claims have been made "available for disposition by the tribal council of said Indians, with the approval of the Secretary of the Interior, in accordance with the constitution and bylaws of the Blackfeet Tribe * * *."[661] Other statutes provided for the expenditure of tribal funds for objects designated or approved by the tribal council concerned.[662] Perhaps the earliest of such provisions is found in section 3 of the Appropriation Act of February 17, 1879,[663] providing for the diversion of various appropriations to alternative uses "within the discretion of the President, and with the consent of said tribes, expressed in the usual manner." This provision was repeated in subsequent appropriation acts[664] and made permanent by the Act of March 1, 1907.[665]

There is an implied agreement between federal and tribal authorities in acts authorizing the Secretary of the Interior to appropriate money for the expenses of tribal councils,[666] tribal delegates,[667] and tribal attorneys.[668]

There are, of course, a great number of statutes authorizing the expenditure of tribal funds without express reference to the wishes of the tribe,[669] and the problem of federal power to expend tribal funds without Indian consent is dealt with elsewhere.[670] It may be noted, however, that the omission of express reference to tribal consent in appropriation provisions referring to tribal funds does not necessarily imply the absence of such consent. In fact, many provisions for the appropriation of tribal funds are sought at the request of the tribe concerned, although no reference to this fact appears on the face of the statute.

The present state of the law with respect to the power of an Indian tribe to expend funds or dispose of other personal property held by the United States in trust for the tribe is that any such expenditure must be authorized by act of Congress.[671] The situation is analogous to that of a private trust, where the trustee must consent to expenditures by the beneficiary out of the trust fund. In the case of the trust funds of an Indian tribe, the power to determine the propriety of expenditures is vested in Congress and only in a very few cases has Congress delegated its power of decision to administrative authorities.[672]

The history of Indian appropriation legislation shows a continuous struggle between two principles: on the one hand, it is

[661] Joint Resolution of June 20, 1936, 49 Stat. 1568. Accord: Act of March 2, 1889, 25 Stat. 1012 (Yankton).

[662] Act of June 20, 1936, 49 Stat. 1543 (Crow); Act of March 1, 1929, 45 Stat. 1439 (Klamath); Act of May 31, 1933, sec. 1, 48 Stat. 108 (Pueblos).

[663] 20 Stat. 295, 315.

[664] See, for example, Act of May 11, 1880, sec. 5, 21 Stat. 114, 133.

[665] 34 Stat. 1015, 1016, 25 U. S. C. 140.

[666] Act of March 2, 1929, 45 Stat. 1496 (Crow); Act of June 1, 1938, 52 Stat. 605 (Klamath).

[667] Act of March 3, 1881, 21 Stat. 435, 453 (Miami, Peoria, Wea, Kaskaskia, and Piankeshaw); Joint Resolution of June 7, 1924, 43 Stat. 667 (Fort Peck); Joint Resolution of May 10, 1926, 44 Stat. 498 (Fort Peck); Act of June 14, 1926, 44 Stat. 741 (Klamath).

[668] Act of April 11, 1928, 45 Stat. 423 (Chippewa of Minnesota); Act of June 26, 1934, 48 Stat. 1216 (Nez Perce).

[669] See, for example, Act of March 3, 1873, 17 Stat. 627 (Nez Perce); Act of June 27, 1902, 32 Stat. 400 (Chippewa of Minnesota); Act of June 28, 1906, 34 Stat. 547 (Menominee); Act of May 26, 1920, 41 Stat. 625 (Five Civilized Tribes).

Expenditure from tribal funds for a wide diversity of purposes considered beneficial to the tribe are authorized in a vast number of statutes. See, for example, Act of January 12, 1877, 19 Stat. 221 (Osage).

The cost of various improvements upon tribal lands has been met out of tribal funds, sometimes with a provision that the cost of the improvement shall be repaid to the tribe by the individual Indian benefited. Act of February 21, 1921, sec. 2, 41 Stat. 1105, 1106 (Red Lake Indian Reservation).

Federal appropriations for improvements upon tribal lands have frequently been made reimbursable obligations against future tribal funds or against such funds as might arise from disposal of the lands improved. Act of July 8, 1916, 39 Stat. 353 (Quinlault Indian Reservation); Act of March 3, 1921, sec. 6, 41 Stat. 1355, 1357 (Fort Belknap); Act of February 14, 1923, 42 Stat. 1246 (Paiute); Act of February 9, 1925, 43 Stat. 819 (Chippewa).

Various other statutes authorize payments from tribal funds to individual members of the tribe who have particular claims upon tribal bounty. Act of April 29, 1902, 32 Stat. 177 (Choctaw-Chickasaw); Act of June 3, 1924, 43 Stat. 357 (Red Lake Indians); *cf.* Joint Resolution of February 11, 1890, 26 Stat. 669.

Certain tribal funds have been made available for loans to individual members of the tribe. Act of March 4, 1925, 43 Stat. 1301 (Crow); Act of May 15, 1935, 49 Stat. 244 (Crow).

Between 1916 and 1925 a number of statutes were enacted appropriating tribal funds, or federal funds, to be reimbursed out of future tribal funds, for roads, bridges, public schools, and other public improvements. Act of June 26, 1916, 30 Stat. 237 (Ponca); Act of August 21, 1916, 39 Stat. 521 (Spokane); Act of February 20, 1917, 39 Stat. 926 (Navajo); Act of June 7, 1924, 43 Stat. 607 (Navajo); Act of February 26, 1925, 43 Stat. 994 (Navajo).

[670] See Chapter 5, secs. 5B, 10.

[671] Funds other than trust funds may be expended without such authorization. See Chapter 5, sec. 10.

[672] *Cf.* 25 U. S. C. 139, 140.

insisted that Congress, in which is vested constitutional power over appropriations, must retain full control of the subject; on the other hand, it is argued that continuity, prudent foresight in the expenditure of funds, and true economy require the setting aside of tribal funds for definite purposes in a manner that will avoid the red tape and delays of reappropriation.[673]

Actual practice has always been a compromise between these two principles. In section 27 of the Act of May 18, 1916,[674] Congress provided:

> § 123. *Expenditure from tribal funds without specific appropriations.*—No money shall be expended from Indian tribal funds without specific appropriation by Congress except as follows: Equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are hereby continued in full force and effect: *Provided further*, That this shall not change existing law with reference to the Five Civilized Tribes.

To this list of purposes for which expenditures may be made from tribal funds by administrative authorities without specific congressional appropriation, a specific addition was made by the Act of April 13, 1926,[675] which declares:

> § 123a. *Tribal funds; use to purchase insurance for protection of tribal property.*—The funds of any tribe of Indians under the control of the United States may be used for payments of insurance premiums for protection of the property of the tribe against fire, theft, tornado, hail, earthquake, and other elements and forces of nature.

Interior Department appropriation acts usually contain, in addition to specific appropriations out of designated tribal funds for specific purposes, general appropriations of the following form:[676]

> Expenses of tribal councils or committees thereof (tribal funds): For traveling and other expenses of members of tribal councils, business committees, or other tribal organizations, when engaged on business of the tribes, including supplies and equipment, not to exceed $5 per diem in lieu of subsistence, and not to exceed five cents per mile for use of personally owned automobiles, and including not more than $25,000 for visits to Washington, District of Columbia, when duly authorized or approved in advance by the Commissioner of Indian Affairs, $50,000, payable from funds on deposit to the credit of the particular tribe interested.

Furthermore, as we have already noted, "miscellaneous revenues * * * not the result of the labor of any member of such tribe" are deposited in a fund peculiarly misnamed "Indian moneys, proceeds of labor," and are thereafter available for expenditure "in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected * * *" subject to the limitations as to tribal funds imposed by section 27 of the Act of May 18, 1916.[677]

In view of the present state of the law, an Indian tribe seeking a particular disposition of "tribal funds" or "trust funds" in the Treasury of the United States, must request a specific congressional appropriation unless "Indian Moneys, Proceeds of Labor" are available *or* the purpose is one of the four purposes for which Congress has given the Secretary of the Interior permanent spending authority, *or* the purpose is one as to which the current Interior Department appropriation act vests temporary spending authority in that Department. Under any of these three exceptions administrative authority rather than congressional appropriation must be obtained.

These limitations upon the power of an Indian tribe to dispose of funds or other personal property in which it has an equitable interest do not extend to funds or personal property over which the tribe has full legal ownership, even though such funds or property are voluntarily deposited for safekeeping with a local superintendent and therefore technically under the Permanent Appropriation Repeal Act of June 26, 1934,[678] within the Treasury of the United States. The Act of June 25, 1936,[679] specifically provides:

> That section 20 of the Permanent Appropriation Repeal Act, approved June 26, 1934 (48 Stat. 1233), shall not be applicable to funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the Act of June 18, 1934 (48 Stat. 984).

Since funds so deposited by an incorporated tribe are not subject to congressional appropriation, it must be held *a fortiori* that funds not so deposited but retained by the tribe are not subject to congressional appropriations. All charters issued to incorporated tribes recognize that funds held in the treasury of an incorporated tribe are subject to disposition, in accordance with the limitations of the charter, by the corporation, and are not in any way subject to congressional appropriation. This conclusion may be based upon the narrow ground that section 17 of the Act of June 18, 1934, expressly authorizes a chartered tribe to "dispose of property * * * real and personal," but it seems more satisfactory to place the conclusion upon the broader ground that the various statutes relating to appropriations of "tribal funds" and "trust funds" use these words in a technical sense, as terms of art, to refer to a well-understood category of funds which are held in the Treasury of the United States to the credit of the tribe pursuant to some law or treaty, and that, therefore, these limitations are utterly inapplicable to funds in the actual possession of the tribe itself.

This view is in accord with the historic fact that Congress has never presumed to interfere with the expenditure of funds held in tribal treasuries, even when the collection of such funds by tribal authorities is regulated by specific legislation requiring reports to Congress by a tribal treasurer.[680]

The difference between the power of an Indian tribe to dispose of personal property and its power over real property may be summed up in a sentence: A tribe may not validly alienate realty except with the consent of the Federal Government, given by Congress or by an official duly authorized by Congress to consent to particular forms of alienation; on the other hand, a tribe has complete power of disposition over tribal personal property, except in so far as such property has been removed from its control and placed in the possession of the Federal Government pursuant to some law or treaty.

Among the limitations voluntarily assumed by Indian tribes

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[673] In other fields of Government, the public purpose corporation has been created to facilitate businesslike handling of appropriations, and this same objective was a major factor in the scheme of tribal incorporation established by the Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 461 *et seq.*

[674] 39 Stat. 123, 159, 25 U. S. C. A. 123 (Supp.) (incomplete in original edition). On the basis of this statute the Comptroller General has held that contracts with attorneys for payment of fees out of tribal funds should not be approved by the Secretary of the Interior in the absence of express statutory authorization. Comptroller's Decisions A. 24931, November 8, 1928; A. 27759, July 1, 1929; A. 29173, May 8, 1930; A. 34858, January 26, 1931; A. 45091, October 20, 1932; A. 81210, December 2, 1936; A. 44289, October 11, 1932. The Interior Department takes the position, in view of the Comptroller General's Opinion of June 30, 1937, discussed *supra*, that these decisions do not apply to funds in the treasury of an organized tribe. Memo. Sol. I. D., January 18, 1938.

[675] 44 Stat. 242, 25 U. S. C. A. 123a.

[676] Act of May 9, 1938, 52 Stat. 291, 315.

[677] 39 Stat. 123, 158, 25 U. S. C. A. 155 (Supp.). And see sec. 23, *supra*. See also Memo. Sol. I. D. January 24, 1936.

[678] 48 Stat. 1224.

[679] 49 Stat. 1928.

[680] See, for example, Act of February 28, 1901, 31 Stat. 819 (Seneca lease rentals).

with respect to the disposition of tribal moneys and other personalty, we may briefly note;

(1) Limitations contained in tribal constitutions.[681]

(2) Limitations contained in tribal charters.[682]

(3) Limitations contained in tribal loan agreements.[683]

(4) Limitations contained in tribal trust agreements.[684]

The grant of funds to Indian tribes for particular uses, under the Emergency Appropriation Act of April 8, 1935,[685] raised additional questions as to the powers of an Indian tribe in handling funds. In response to the question put by the Commissioner of Indian Affairs whether an Indian tribe might "use the proceeds of rentals of land improved through rehabilitation grants to finance additional construction projects or to meet general tribal expenses or to make per capita payments," the Solicitor of the Interior Department ruled:[686]

> 4. When money has been granted to an Indian tribe to be used for a particular purpose, e. g., the development of springs on tribal land or the construction of houses, the Presidential letter above set forth imposes no duty on the tribe when once the money has been properly expended. The fact that such expenditures may increase tribal income from the issuance of leases or permits on tribal land, or tribal income from other enterprises, does not subject a part of that income, or all of it, to any lien on the part of the Federal Government. Such income may, therefore, be received and disbursed by the Indian tribe in any manner not prohibited by Federal law or by the constitution, bylaws, or charter of the tribe, unless the tribe has specifically agreed to use such rentals or income for a specific purpose. It is, of course, within the power of a tribe to agree, through its representative council or other officers, that certain income available to the tribe shall be used only for designated purposes not inconsistent with law.

Following this determination, the Indian Office entered into trust agreements with various Indian tribes under which the Indian tribe became trustee of the funds granted and the proceeds thereof for the benefit of needy Indians entitled to the benefits of the act in question.[687]

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[681] See, for example, the following provisions of the constitution and bylaws of the Hualapai tribe, approved December 17, 1938:

> Art. VI, Section 1. The Hualapai Tribal Council shall have the following powers:
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>
> (e) To deposit all Tribal Council Funds to the credit of the Hualapai Tribe in an Individual Indian Moneys Account, Hualapai Tribe of the Truxton Canon Agency, such funds to be expended only upon the recommendation of the Tribal Council in accordance with a budget having prior approval of the Secretary of the Interior.
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> * * * * * * *
>
> BYLAWS OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, ARIZONA
>
> ARTICLE 1—Duties of Officers.
>
> * * * * * * *
>
> SEC. 4. *Treasurer.*—The Treasurer shall accept, receive, receipt for, preserve, and safeguard all funds in the custody of the Tribal Council. He shall deposit all funds in such depository as the Council shall direct and shall make and preserve a faithful record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody, at such times at requested by the Tribal Council. He shall not pay out or disburse any funds in his possession or custody, except in accordance with a resolution duly passed by the Council. The books and records of the Treasurer shall be audited at least once each year by a competent auditor employed by the Council and at such other times as the Council or the Commissioner of Indian Affairs may direct. The Treasurer shall be required to give a bond satisfactory to the Tribal Council and to the Commissioner of Indian Affairs. Until the Treasurer is bonded, the Tribal Council may make such provision for the custody and disbursement of funds as shall guarantee their safety and proper disbursement and use.

[682] See, for example, the following provisions from sec. 5 of the corporate charter of the Confederated Salish and Kootenai tribes of the Flathead Reservation, ratified April 25, 1936:

> 5. The tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the constitution and bylaws of the said tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the tribal constitution and bylaws:
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> * * * * * * *
>
> (b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:
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> * * * * * * *
>
> 5. No distribution of corporate property to members shall be made except out of net income.
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> * * * * * * *
>
> (d) To borrow money from the Indian credit fund in accordance with the terms of section 10 of the act of June 18, 1934 (48 Stat. 984), or from any other governmental agency, or from any member or association of members of the tribe, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the tribe: *Provided*, That the amount of indebtedness to which the tribe may subject itself shall not exceed $100,000, except with the express approval of the Secretary of the Interior.
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> * * * * * * *
>
> (f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana, including agreements with the State of Montana for the rendition of public services and including contracts with the United States or the State of Montana or any agency of either for the development of water-power sites within the reservation: *Provided*, That all contracts involving payment of money by the corporation in excess of $5,000 in any one fiscal year, or involving the development of water-power sites within the reservation, shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.
>
> (g) To pledge or assign chattels or future tribal income due or to become due to the tribe under any notes, leases, or other contracts, whether or not such notes, leases, or contracts are in existence at the time: *Provided*, That such agreements of pledge or assignment shall not exend more than 10 years from the date of execution and shall not cover more than one-half the net tribal income in any 1 year: *And provided further*, That any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.
>
> (h) To deposit corporate funds, from whatever source derived, in any National or State bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the postal-savings bank or with a bonded disbursing officer of the United States to the credit of the tribe.

[683] See Chapter 12, sec. 6.

[684] See Chapter 12, sec. 6.

[685] 49 Stat. 115.

[686] Op. Sol. I. D., M.28316, March 18, 1936.

[687] See Chapter 12, sec. 6.