HANDBOOK of FEDERAL INDIAN LAW

WITH REFERENCE TABLES AND INDEX

By

FELIX S. COHEN
Chairman, Board of Appeals
Department of the Interior

Foreword by

HAROLD L. ICKES
Secretary of the Interior

Introduction by

NATHAN R. MARCOLD
Solicitor for the Department of the Interior

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

Civil jurisdiction under, 45
Claims under, 32, 56ff, 310, 374
Compelling school attendance, 241
Conferring powers on
Congress, 42
President, 42
Conferring United States citizenship, 64, 133
Construction of, 34, 37ff, 41, 127, 172, 256
Criminal jurisdiction under, 45
Defence, 17
Defining tribal property rights, 255
Establishing tribal land ownership, 254
Exempting Indian land from state taxation, 257
Extinguishing Indian titles to lands under, 61
Federal power to execute, 17, 33, 38, 91
Fixing boundaries, 40, 310
Granting occupancy rights, 188
Guaranteeing civil liberties, 178, 179
History of, 46ff
Legislation contravening, 34
Limitations, 38
Limiting tribal power, 46
Modification of, 34ff
Particular provisions, 57, 298, 310, 334
Providing health services, 243
Provisions in re trade, 40, 41
Removal of Indian westward under, 53ff
Reserving tribal rights in ceded land, 44, 294ff
Saving clauses in, 38
Scope of, 32ff
Services provided for in, 44ff
Subjects covered by, 39ff
Termination of treaty-making, 18, 33, 43, 60ff, 77
Validity and effect of, 30ff, 62
With states, 120

TRIBES
Action against lessee under void lease, 331
Legislation, XIII, 69, 77, 309ff
Suits by United States to enjoin, 36ff
Treaties prohibiting, XIII, 40, 309

Type of trespassers, XIII, 306

TRIBAL FUNDING See also FUNDS, INDIVIDUAL.

Classes of, 105, 340ff
Competency as a condition to receipt of, 169
Congressional power over, 97, 105, 345ff
Creditors' claims, 339
Distinguishing from United States public moneys, 337
Distribution of, 122, 168, 338, 341ff
Statutes regulating manner of, 198, 343ff
Dissolution of, liability of Congress for, 67
Enrollment as a condition to receipt of, 98, 114, 344
Federal administrative power over, 105
Federal expenditure of:
- Generally, 15, 97, 100, 237, 345ff
- For health services, 243
- For Indian education, 242, 337, 346
- For Indian visits, 346
- For insurance, 346
- For loans, 244

General, 106ff
In trust, 106ff, 338, 345
Individual interest in, 184, 338
Individualization of, 184, 187ff
Of incorporated tribes, 340
Right to interest, 338ff, 341
Segregation of, 114, 193, 202, 339, 344
Sources of, 340ff
Special, 106ff
Taxing lands purchased with restricted, 250ff

TRIBAL LAND
Acquisition of, by Secretary of Interior, 106ff, 300, 320ff
Administration of Indian Service re, 30
Alaskan Natives, 411ff
Alienation of, 104, 187, 221, 320ff
Federal administrative power over, 104
Restraints on, 320ff
Allotments (see ALLOTMENTS)
As public lands, 256
THE DEVELOPMENT OF INDIAN SERVICE POLICIES

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 whatever means 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.

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

* * * 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 sincerely observing our pledged faith with these poor creatures, and every principle of justice and humanity prompts to a strict performance of our obligations.

Commissioner Denyer, in 1857, 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. Of Indians who had removed to large reservations of fertile and desirable land, there was nothing to prevent them from occupying it in such a manner as to make it useful to them, and also to enable them to form settlements and establish the same in their own interest. His report contains the following:

Commissioner Denyer 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 disorganize and leave them without a domestic government. The distribution of the money should be left to the chiefs, so far as possible, to enable them to punish the wasting and unwise use of it from them.

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

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.

In 1858, Commissioner Mix estimated the number of Indians to be about 350,000, approximately the same number as it is estimated exists today. He further estimated that about 333 treaties had been signed since the adoption of the Constitution; and that approximately 681,163 acres had been acquired through cession at a cost of $49,816,344.

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

that the Indian tribes possessed the occupant or untrust 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.

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.

According to Commissioner Mix, past Government policy had been in error in at least three respects:

1. Settlements and the cession of land for the purpose of making the Indians of the ceded lands poor and destitute.
2. Assignment of too large a country to be held in common, which resulted in improper use and failure to acquire settled habits and a knowledge of and for civilized pursuits.
3. The military and police, which resulted in idleness among Indians and fraudulent practices by whites.

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.

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."

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

---

[References and notes are omitted for brevity.]
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 a use and disposition of tribal lands. The extent of congressional power has been expressed by the Attorney General as follows:

"Now, as these royalties are tribal funds, it can not be seriously contended that Congress had not power to provide for their disposition 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; U.S. ex rel. 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. 65;"  

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

"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 frequently, for judicial discussion 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."

C. INDIVIDUAL LANDS

The power of Congress over individual lands, while less sweeping than its power over tribal lands, is clearly broad enough to give supervision of the alienation of individual lands. In fact, the exercise of congressional power over individual lands has been largely directed toward the release, extension, or reformation 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," Congress not only has the power to extend, modify, or remove existing restrictions on the alienation of such lands but while the Indian is still the ward of the nation it may impose restrictions on property already freed from restrictions or delegate such power to an executive officer."

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. Such restrictions must be expressed and are not implied merely because the owner of land is an Indian, nor can such restrictions be made retroactive so as to invalidate a conveyance made by an Indian before the restriction was imposed.

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. 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. Confining citizenship is not inconsistent with the continuance 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. 580, 606, and cases cited. (Pp. 459-460)."

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

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:

Judd v. Wilson, 23 How. 457 (1859).  
Wilson v. Watt, 6 Wall. 83 (1867).  
United States v. Walker, 243 U.S. 423 (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.

In adopting the restrictions, Congress was not imposing restraints on a class of persons who were not free, but on Indians who were being conducted toward the state of freedom worshiping to one of full emancipation and needed to be safeguarded against their own improvident policies during the period of transition. The purpose of the restrictions was to give the needed protection. (Pp. 454-455). Smith v. McCollough, 270 U.S. 466 (1926).

Heckman v. United States, 224 U.S. 417 (1912); Doss v. United States, 224 U.S. 458 (1912); Stover v. Long, 227 U.S. 613 (1913); Merson v. Smith, 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 Indians under the patent does not impair the restrictions. Also see Miller v. McClain, 249 U.S. 308 (1919); United States v. Reynolds, 255 U.S. 104 (1919); and Smith v. Stevens, 77 U.S. 232, 260 (1867), discussing the policy behind restrictions on sale of land by Treaty between the United States and Kansas Indians of June 3, 1893, 7 Stat. 244, 245, and the Act of May 20, 1860, 12 Stat. 21.
THE SCOPE OF FEDERAL POWER OVER INDIAN AFFAIRS

Chooz v. Trapp, 99, which held that an exemption from taxation established by Congress created in the Indian landholder a vested right not subject to impairment by later legislative act. 10


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 it is excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same manner as other residents or citizens of the United States. In re Hopp, 107 U. S. 485, 504; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307; Smith v. Woodard, 20 Johns. (N. Y.) 189; Le Roy v. Weyer, 1 McKean, 82; Wheeling v. Vann der Ahe, 67 Mo. App. 526; Taylor v. Drew, 21 Arknsa, 455, 477. His right of private property is not subject to impairment by legislative act, 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. Marsh, 175 U. S. 31 (1899).

Nothing that was said in Tiger v. Western Lumber Co., 221 U. S. 296, 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 individual's disability. The estate did not attempt to take away his personal property, but merely the right to vote and stand for office by reason of the two years during which he was a minor. This, in my opinion, is a different situation.

On that subject, as well as the fact that there was still a war between the Nation and the alienation of the land was under the war department, and, if the land was not taken possession of by the Indians, they could not sell. On that subject, and if the land was not taken possession of by the Indians, they could not sell. On that subject, it was the right to the land of the Nation and not the alienation of the rights of the alienation which had been vested in the individual by prior law, and only the right to the land, and not to the ownership of the land, or otherwise, which are considered as vested rights, and not to be affected by anything contained in this treaty.

SECTION 6. CONGRESSIONAL POWER—MEMBERSHIP

The Indian tribes have original power to determine their own membership. 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.

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. 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

See Chapter 7, sec. 4.

The Circuit Court of Appeals in the case of Farrell v. United States, 110 Fed. 943 (C. C. A. 8, 1901), said:

"... It is the settled rule of the judicial department of the government, in ascertaining the relations of the Indian tribes and their members to the Union, to follow the action of the legislative and executive departments in which they have been specially instructed. U. S. v. Holiday, 3 Wall. 407, 18 L. Ed. 29 (1865); U. S. v. Gull, 3 Wall. 68, 18 L. Ed. 29 (1865)."

7 Fed. 75, 78. (P. 961.)


11 See, for example, Treaty of July 8, 1817, with the Cherokee, Art. 2, 3 Stat. 156; Treaty of November 24, 1848, with the Stockbridge Tribe, Art. 2, 9 Stat. 925; Treaty of November 13, 1861, with the Pottawatomie Nation, Art. 2, 12 Stat. 1191; Treaty of June 24, 1862, with the Kickapoo Indians, Art. 2, 12 Stat. 1127; Treaty of June 28, 1862, with the Kickapoo Indians, Art. 2, 13 Stat. 282; Treaty of October 14, 1865, with the Cherokees and Arapahoe Tribes, Art. 7, 14 Stat. 708. The general rule is that "in the absence of (statutory) provision, the right, so far as concerns the right of any individual, should be left to the discretion of the Indian."

12 See, for example, Act of March 3, 1873, sec. 4, 17 Stat. 631 (Micmac); Act of March 3, 1881, sec. 4, 21 Stat. 414, 453 (Miami); Act of July 1, 1905, sec. 1, 31 Stat. 838 (Kansa); Act of June 4, 1905, sec. 41 Stat. 761 (Crow); Act of May 19, 1924, 43 Stat. 132 (Lac du Flambeau band of Chippewa). See also Campbell v. Woodsworth, 248 U. S. 109 (1918).

13 See, for example, Act of May 30, 1898, 29 Stat. 729 (a Sec. 36, Stat. 750 (Pawnee Civilized Tribe); Act of May 31, 1924, c. 215, 43 Stat. 246 (Flathead); also discussed in Op. Sol. I. D., M. 14123, April 24, 1925; also see Gritts v. Otter, 204 U. S. 646, 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. In thus construing the Act of June 18, 1934, the Solicitor for the Interior Department declared: 35

* * * 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 requires the consent of an organized tribe to any grant of right-of-way which the Secretary is authorized to make. 36

Tribal consent is likewise required where the Secretary of the Interior seeks to set aside tribal lands for reservoir purposes for an irrigation project. 37

* * * 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 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.

---

SECTION 10. ADMINISTRATIVE POWER—TRIBAL FUNDS

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, 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. 38

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 or organized under section 16 of that act. 39 In both cases the scope of administrative 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.

---

11 The Act of April 1, 1860, c. 41, 21 Stat. 70, provided:

That the Secretary of the Interior be, and he 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 tribal lands, and the sale 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 any and all such sums in the United States Treasury, at the rate per annum stipulated by treaty 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. It has been suggested that the Federal Government might bring suit on behalf of an Indian to secure a fair distribution of such funds, but there are no decisions on this point. See Memo. Sol. I. D., November 18, 1938 (Palm Springs).


11b. See Chapter 13, sec. 23.

11c. Secs. 23 and 24, 63000B—45—9

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, usually arising out of a treaty.

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.

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. 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.

35 See Chapter 1, sec. 1; Chapter 2, sec. 2; Chapter 3, sec. 26; Chapter 16, sec. 36. 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 520 (App. D. C. 1927), United States v. Goehr v. Work, 18 F. 2d 522 (App. D. C. 1927); United States v. Daniel v. Work, 18 F. 2d 522 (App. D. C. 1927).

36 See Chapter 16, sec. 23.

37 See Chapter 15, sec. 23.

38 The Act of May 18, 1918, sec. 27, 35 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 17, 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 judged to be safe and beneficial for the fund, all moneys that may be received under treaties, etc. stipulations for the payment to Indians, annually, or in such manner as the Secretary may determine to be in the interest of the fund; 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.

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.22

The Court of Claims in the case of Creek Nation v. United States23 said:

"... The Secretary of the Interior has only such authority over the funds of Indian tribes as is conferred by law. If the Secretary is sued in the Court of Claims to recover the moneys paid out of such funds, the Court must decide whether the expenditures purported to be made by the Secretary were made under authority of law."

In the light of the precise questions presented, we are unable to say 

interest at less than $5 per centum per annum."


There are many special statutes relating to the disposal of tribal funds. For example, the Act of June 20, 1930, 43 Stat. 1543, provides:

That tribal funds now on deposit or later placed in the credit of the Cripple Creek Indians, may be used for re-employment, or such other purposes as may be designated by the tribal members. The Secretary of the Interior is authorized hereby to dispose of the same.

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:

(a) Under Section 7 of the act of January 14, 1889, (25 Stat. 645), providing that the net proceeds of the sale of all 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 disburse at the rate of $5 per centum per annum, principal and interest to be expended for the benefit of said Indians.

(b) Under Section 5 of the Act of June 15, 1890, (21 Stat. 401), in connection with the sale 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 special fund for said Peoria Indians, an amount of money sufficient at four per centum to produce annually five 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 specific purposes before they were ceded into the Treasury, in which they have been placed for safe-keeping, are subject to withdrawal from the Treasury for expenditure for those objects without further appropriation (3 Comp. Dec. 219, 1901). It is true that in some instances Congress has expressed a desire that the money be used for a particular purpose, and has so declared in the statutes creating the funds. In such cases the term "appropriation" in the statutes is an expression of the congressional intention that the money shall be used for the purpose so designated."
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 wills;
(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, as is the legislation governing jurisdiction of the courts for allotments. Within the fabric of rights and remedies thus defined there is a certain scope of administrative discretion which is described in a recent ruling of the Solicitor for the Interior Department in these terms:

The Secretary may for good reason refuse to approve an allotment, but he may not ожил approval of an allotment except to correct error or to relieve fraud. Cf. Corneleus v. Exrel (128 U. S. 450) (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.

(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. 294). Since only the routine matters 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. 699 (1929)). Cf. Where a certificate of approval has been issued as in the Five Civilized Tribe cases, Bullinger v. Frost (216 U. S. 249); and where right is a homestead, involved, Stark v. Starre (6 Wall. 402). And then the allottee may bring mandamus to obtain the patent. See Pachos v. Nichols-Chisholm Lumber Co. (128 Minn. 149 N. W. 298, 200 (1914)); Lane v. Hoglund (234 U. S. 174); Buttersworth v. United States (112 U. S. 50); Barry v. Dolph (97 U. S. 522, 526).

(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 (295 U. S. 38); 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 (229 U. S. 62). See Philomene Smith (24 L. D. 253, 257). The owner of an allotment, even before its approval, has an inherent interest (United States v. Chase (245 U. S. 89); Smith v. Bonifer (128 Fed. 456) (C. C. A. 9th, 1909)); which will be protected from the outside world (Smith v. Bonifer, supra); and which he can transfer within limits (Hemleb 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 interest against adverse interests possessing the patent (Hy-Yu-Tee-Mill-Rin v. Smith (194, U. S. 401); Smith v. Bonifer (132 Fed. 359) (C. C. O. C. 1904), 168 Fed. 446 (G. C. A. 9th, 1905)); and against the Government itself. Conroy v.
THE SCOPE OF FEDERAL POWER OVER INDIAN AFFAIRS

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.41 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.42 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 power43 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.44

The power of the Secretary to determine tribal membership45 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 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.46 Statutes also impose such duty upon the Secretary or quasi judicial tribunal,47 whose determinations are subject to the approval of the Secretary of the Interior. Such enrollments are presumptively correct,48 and unless impeached by very clear evidence of fraud, mistake, or arbitrary action they are conclusive upon the courts.49

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.50 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.51

For example, the Secretary of the Interior was empowered by section 2 of the Act of April 26, 1906, to complete the rolls of the Creek Nation, and his jurisdiction to approve the enrollment ceased on the last day set by the statute.52 In United States v. Johnson v. Payne,53 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:

41 See Chapter 10, sec. 4.
42 See Chapter 10, sec. 4.
43 The limitations on administrative power over membership are indicated by an opinion of the Circuit Court of Appeals in Ke porte Pe, 99 F. 24 28 (C. A. 7, 1918).
44 * * * 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 Mt. Creek Indian because she was too young, not because she was not an Indian. (Pp. 31-32.)
45 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; Oil. Mem. October 17, 1887; Oil. Mem. March 24, 1928. According to administrative practice, in doubtful cases the tribal action is regarded as controlling.
46 The Circuit Court of Appeals in Fain v. United States, 246 Fed. 411, 415 (C. C. A. 8, 1917), said

The law did not fail for the consent of the Indians to the making of the list for allotment. That power was never vested in the commissioners, but they wisely in the main decided to take the advice of an Indian. (C. C. A. 8, 1917).

47 Citizenship in a tribe and tribal membership are sometimes used synonymously. Seminole Nation v. United States, 73 C. 515 (1933).

48 The agent has the duty of preparing certain statistics concerning Indians under his charge. Sec. 4 of the Act of March 3, 1876, 18 Stat. 420, 449, 25 U. S. C. 133, provides:

That hereafter, for the purpose of properly distributing the supplies and funds provided 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 the 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 give to non-heads or lodges, 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, 08, 25 U. S. C. 208, provides that the Indian agent shall submit to 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 10, the number of school houses at his agency, and other data concerning the education of the Indians.


52 United States v. Wildcat, 244 U. S. 111 (1917).
53 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. Sel. I. D., M. 2719, January 22, 1935.
54 United States v. West v. Hitchcock, 205 U. S. 60 (1907).
55 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. Gurfield v. United States v. Goldady, 211 U. S. 249 (1904). 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. Lee v. Fisher, 223 U. S. 65 (1912).
56 Determinations of the Dawes Commission were subject to attack for extrinsic fraud or mistake. Tiger v. Futa State Oil Co., 48 F. 50 509 (C. C. A. 10, 1931).
60 24 Stat. 137.
61 223 U. S. 250 (1900).
various Indian tribes. 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 15, 1894, established a basis for the adoption of tribal constitutions approved by the Secretary of the Interior, which could be enacted 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 15, 1894, 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, 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 subsequently be amended or entirely revoked only by the same process.

The powers which may be exercised by an Indian tribe or by its elected or appointed representatives may be delegated 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 group 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 and Oklahoma vary considerably with respect to the form of tribal government, ranging from ancient and primitive forms to 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. 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, 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 thereafter 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. 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. 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.

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;
2. That the ordinance violates some federal law;
3. That the ordinance is unjust to a minority group within the tribe.

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 13, 1935. (Lower Sioux Indian Community; Prairie Island Indian Community.)

Memo. Sol. I. D., October 22, 1938 (San Carlos Apache).
* Approved December 13, 1935. (Mona Paiute).
* See, for example, Memo. Sol. I. D., December 14, 1937 (Hopi).

---

---
INDIVIDUAL RIGHTS IN TRIBAL PROPERTY

a "prospective right" to future income from tribal property in which he has no present interest. Other terms used to picture this right are "an inchoate interest" and a "foot." 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 interest in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions. 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.

The statement has often been made that the tribe holds its property in trust for its members. 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 Shalihb vs. McDowall, 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 and held by the nation. They constituted the home 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 government not only as the home of the tribe, but as a home for each of the members.

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 appropriated should be treated as the common property of the Nation." 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 vs. de Graffenried, the principle upon which conveyances of land to the Five Civilized Tribes were made. Treaties often provided that the land conveyed to the tribe was to be held in common. Likewise, certain statutes specify that tribal lands are to be held or occupied in common.

In the case of United States vs. Charles, the court, in referring to the lands occupied by the Tomwaconda 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, provide that all lands held by the tribe shall be held in the future as tribal property.

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. vs. United States. 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. 297.)

In the case of Mason vs. Sanes, the Treaty of 1855 between the United States and the Quinaults 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.

---

184


9 See, for example, Joint Resolution, June 19, 1892, 32 Stat. 744 (Walker River, Utah, and White River Utes). Various allotment statutes reserve from allotment lands to be held "in common," specifies occasionally for the reservation of grazing or timber lands, lands containing springs, etc. See, for example: Act of March 3, 1885, 23 Stat. 476 (Iowa, Minnesota Reservation); Act of March 3, 1899, 25 Stat. 1013 (United Peorias and Minnies); Act of June 3, 1899, 44 Stat. 690 (Northern Cheyenne Indian Reservation). See, also, Chapter 15.

9 See Mitchell vs. United States, 9 Pet. 711, 748 (1838).

99 Cited and discussed in Cherokee Intermarriage Cases, 203 U. S. 76 (1896), and in The Cherokee Trust Funds, 117 U. S. 288 (1886).


99 B. B., Art. 8, sec. 2, of the Constitution and Bylaws for the Shawnee-Hoxsey Tribes of the Fort Hall Reservation, Idaho, approved April 10, 1938.


99 12 Stat. 971.

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY

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. The manner in which the plenary power over tribal property could be exercised to affect the individual's rights is discussed elsewhere.

A. MODES OF DISTRIBUTION

Where Congress has prescribed the method of distributing tribal property, equal division per capita has been the general rule. 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. "Every member of the tribe has an interest in preventing one member from getting more than his share." 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.

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.

Where, however, the Federal Government has provided for a distribution of land or overcoats or teams of oxen, differentiation has frequently been made between adults and infants or between heads of families and dependents or between men and women. 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.

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, or to each member who meets certain qualifications.

135This, 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 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; and 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 hereafter be born, in a section, directing an allotment of the lands embraced in any reservation, one-sixteenth of a section, or the fraction thereof necessary to make a section, out of the lands hereby withdrawn, in such manner as the President shall direct."

136An example of a treaty provision modifying the general rule of equality is Art. 10 of the Treaty of October 1, 1859, with the Sac and Fox of the Mississippi, 15 Stat. 497, 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, 256-260 (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, 25 Stat. 636 (Shawnee and Delaware Indians and Cherokee freedmen); Act of March 2, 1893, 27 Stat. 744 (Stockbridge and Muscogee tribe); Act of April 28, 1894, 33 Stat. 519 (Wiyot and Redwood Indians); Act of March 1, 1907, 34 Stat. 1056 (Fox and Fen Indians); Act of August 11, 1918, 39 Stat. 509 (Rosebud Sioux Reservation); Act of March 4, 1917, 39 Stat. 1195 (Sioux); Act of April 14, 1924, 43 Stat. 95 (Chippewa of Minnesota); Act of May 5, 1929, 45 Stat. 484 (Sioux Tribe); Act of March 4, 1929, 45 Stat. 1500 (Loyal Shoshone Indians); Act of March 2, 1931, 46 Stat. 1495 (Shoshone Tribe).

The following appropriation Acts include special provisions for per capita payments to specified individuals or classes of individuals within a tribe:


The 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, 1895, 25 Stat. 360, 365 (Kaw and Kiowa Tribe).

INDIVIDUAL RIGHTS UPON DISTRIBUTION OF TRIBAL PROPERTY

To equalize allotments, various acts provide for the payment of the "value of" or the withholding of payment of "tribal funds to individuals."

B. TIME OF DISTRIBUTION

Ordinarily, acts provide 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. 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.


The act of March 3, 1889, 25 Stat. 94 (Amended by the Act of June 21, 1909, 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 be or may thereafter take his or her allotment of land in severalty, shall be provided with two mules, one cow, or one cow and one horse, one plow, one harrow, one hoe, one ax, and one pitchfork, all suitable to the work thereon to be done, and also twelve dollars in cash. (P. 101.)

And see Act of March 3, 1906, 35 Stat. 753 (Quapaw, Modoc, Klamath).

Act of June 1, 1938, 52 Stat. 605 (Klamath).

See the Act of April 28, 1890, c. 786, 24 Stat. 137 (Five Civilized Tribes).

See the Act of March 1, 1901, 31 Stat. 861, 862-863 (Creek).

Parallel problems arise in the law of corporations, future interests, and trusts. See Chipley v. Second Nat'l Bank, 78 Conn. 775, 60 Am. Rep. 1000 (1905), and ex. inf. Jerome v. Chipley, 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 stockholder is imposed upon the segregated fund. See New York Trust Co. v. Edwards, 274 Fed. 622 (D. C. R. D. N. Y. 1911). See also Gribbon v. Blake, 249 Mass. 430, 142 N. E. 524 (1924), to the effect that income accruing to a life tenant during his lifetime, but not yet distributed, is not part of the principal fund of the corporation, is payable to the life tenant and not to the corporation.

The Act of January 14, 1889, 25 Stat. 442, 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 paid into the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota; and therefrom shall be paid to the several individuals entitled thereto the sum of five dollars per acre of land purchased by the several individuals for the sum of ninety-two dollars and sixty-six cents per acre, or for each additional acre purchased by the several individuals for the sum of four dollars and sixty-six cents per acre, for each additional five acres purchased by the several individuals above the said sum of ninety-two dollars and sixty-six cents per acre.

The fund shall be expended for the benefit of said Indians in such manner as may be determined by the several individuals entitled thereto. No part of the fund shall be expended for the benefit of said Indians in any other manner than as aforesaid. No part of the fund shall be expended for the benefit of said Indians in any other manner than as aforesaid.

SOURCES OF INDIVIDUAL PERSONAL PROPERTY—TRIBAL FUNDS

A second important source of individual funds is the individualization of tribal funds.* 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.*

* The nature of tribal funds is discussed in Chapter 3; 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 money, tribal and individual, see 25 C. F. R. 231.1-233.7.

** See Chapter 9.

** See Chapter 9.

---

restrictions on allotments held by adult mixed bloods. In United States v. Park Land Co., 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. Congress retains control over the land and the proceeds therefrom.

Section 1 of the Act of May 29, 1906,* 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 held during the period for the term of five years not to exceed the life of the allottee or of the heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs:

Sections 1* and 4* of the Act of June 25, 1910,** 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 disposed of for his benefit under rules and regulations prescribed by the Secretary of the Interior. 

The imposition of a trust over Indian funds may be effectuated by treaty as well as by statute. In the treaty concluded Sep-

* 188 Fed. 383 (C. C. Minn. 1911). In United States v. First National Bank, 234 U. S. 245 (1914), 292 F. 190 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 for his benefit under rules and regulations prescribed by the Secretary of the Interior. 


** * 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 the lands shall be paid to such heirs or devisees as may be competent and in trust subject to the sale and conveyance foreclosed that period of five years or until the same shall be disposed of, 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, amend. sec. 1. See 25 U. S. C. 372. 

Sec. 4 provides for the leasing of allotted lands for a period not to exceed five 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 benefit, or in the discretion of the Secretary of the Interior. See 25 U. S. C. 403.

Sec. 235. This act applies to proceeds derived from the sale of such lands held in trust as well as lands in which the power of alienation is restricted. United States v. Bang, 256 U. S. 414 (1922), rev'd 261 Fed. 827 (D. C. D. N. Y. 1920).

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

SECTION 4. SOURCES OF INDIVIDUAL PERSONAL PROPERTY—INDIVIDUALIZATION OF TRIBAL FUNDS
By the Act of March 2, 1897, Congress provided generally for the distribution of tribal funds among individuals. Those Indians whose the Secretary of the Interior believed capable of managing their affairs could have placed 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. 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, 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, 1898, 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. Nevertheless, the Indian may still apply for funds as his pro rata share in tribal assets, under the Act of 1907. 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 10 of the Act of June 18, 1934, such applications must receive the approval of the tribal council, if the tribe in question is organized under that act.

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, 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, Congress provided for the distribution of tribal funds of the Ute Indians. The shares of all were to be deposited as individual Indian moneys and subjected to the rights of the individual 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.

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." 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.

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.

"Individual Indian moneys are funds, regardless of derivation, belonging to individual Indians which come into the custody of a disinterested agent." 34 C. F. R. 221.1. See sec. 8, infra, for a discussion of these regulations.

2. Joint Resolution, June 20, 1936, 49 Stat. 1269, authorizing distribution of judgment in favor of Gros Ventre Indians among enrolled members.
3. The Joint Resolution of June 20, 1938, 49 Stat. 1268, provides for a per capita payment of $83, and places the remainder of the fund awarded to the Blackfoot Tribe at the disposal of the tribal council and the Secretary of the Interior.
4. Under the Joint Resolution of April 29, 1930, 46 Stat. 265, 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. 322. 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 do so shall have 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.

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

A third source of individual personality 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. 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. Gifts

The Act of March 30, 1897, 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 the relationship, it shall be lawful for the President of the United States, to cause there 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. Miamis of Kansas are given
percent of all Indian lands and 35 percent of the allotted lands.

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 any band or tribe.

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.

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, 1884, 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 and above the transferor's retained occupancy right. 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 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, 1838 (7 Stat. 475) granting land to Cherokee Nation.

After issuance of such patent, however, an organized tribal body, under section 5 of the act of June 18, 1884, surrenders legal title to the land, if it so chooses, 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, 1884, since 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 allottees 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 each such allottee or right shall be exempt from State and local taxation."

110 Memo Sol. L.D., April 4, 1835.
111 Memo Sol. L.D., August 14, 1837.
TRIBAL RIGHTS IN PERSONAL PROPERTY

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

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 personality.

The question of who compose 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 property 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 personality by the question of when interest is payable on tribal funds held by the United States, although this problem shows a close 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 personality, but is in fact basically analogous to problems in the field of tribal property, 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, money, credits, shares of stock, choses in action, and herds.

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.

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.

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. 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 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." 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 that: The "Trust Fund" has been set aside for the Indians and the income expended for their benefit, which expenditures required an annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum by the act of 1885, 25 Stat. 888, chap. 495. 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. 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.

In the case of United States v. Sinnott, 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 pill 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 Molalla, of December 21, 1855, (12 St. 961.) and in fact belongs to them; and therefore, in my judgment, such lumber was not the "property" of the United States, within the pursuance of section 3615 of the Revised Statutes, which requires the proceeds of any sale thereof to be conveyed into the treasury; nor was the money received therefrom, received "for the use of the United States," within the pursuance of section 3617 of the Revised Statutes. (Pp. 85-86.)

See, for example, Act of June 10, 1872, 17 Stat. 388 (sale of Iowa tribe 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, 1929, sec. 8, 41 Stat. 751, 753. See also Act of March 3, 1921, sec. 5, 41 Stat. 1305, 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).

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

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 the use of the education 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 shall be used only for purposes which the agreement shall be carried on under the regulations and supervision of the

And see Sec. 26 of this chapter.

And see Chapter 14, sec. 6.

210 U. S. 50 (1908).

Act of June 10, 1899, 29 Stat. 321, 345; Act of June 7, 1897, 30 Stat. 83, 79; similar provisions are found in more recent appropriations acts, e.g., Act of March 2, 1947, 59 Stat. 968


29 Fed. 94 (C. C. Ora. 1898).
TRIBAL PROPERTY

In a somewhat similar case, the United States Supreme Court declared:"

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. 803.)

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."

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, there was a possible ambiguity in the original statute 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 fund as a question of 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."

Therefore individual members who separate from the tribe forfeit a legal claim to annuities."

As was said in the case of The Sac and Fox Indians per Holman, J.

The Government did not deal with individuals but with tribes. Blackfeather v. United States, 190 U. S. 368, 377. See Fleming v. McCarthn, 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. 94; October 21, 1837, 7 Stat. 540; October 11, 1852, 7 Stat. 599. See treaty of October 1, 1829, 19 Stat. 467. (P. 494.)

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 1864 had the sanction of statute. The act of 1854 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."

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 depository 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, or to compensate for the defaults of states on state bonds."

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."

The chief difficulties with respect to the proper distribution of tribal funds have arisen in connection with the amalgamation of distinct tribes, the splitting of single tribes, 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.

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

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

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


Dukes v. Goodall, 5 Ind. T. 145 (1898) (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, 22 Op. A. O. 540 (1907); see Parks v. Rose, 11 How. 362, 374 (1855). And of Muskrat v. United States, 219 U. S. 349 (1911), per 44 C. C. A. 137 (1909) (holding unconstitutional provision in the Appropriation Act of March 1, 1907, 34 Stat. 1018, 1028, conferring jurisdiction upon the Court of Claims and the Supreme Court to determine the constitutionality of the Act of April 26, 1900, 34 Stat. 137, as amended by Act of June 3, 1906, 34 Stat. 326, adding new members to Cherokee rolls.


Act of August 30, 1832, sec. 3, 10 Stat. 41, 56.


Fed.
TRIBAL RIGHT TO RECEIVE FUNDS

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

Under such treaties what amounted to interest payments were designated "annuities."  
The Act of April 1, 1860, authorized the Secretary of the Interior to deposit such funds in the United States Treasury, in lieu of investment, with such provisions that interest should be payable "semiannually..." at the rate per annum stipulated by treaties or prescribed by law."  The Act of February 12, 1903, as amended by the Act of June 17, 1909, 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."  

When tribal funds held by the United States were segregated for pro rata distribution and deposited in banks, section 23 of the Act of May 25, 1913, 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 1933 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 inconsistent with the provisions of this section as amended.  
It was administratively determined that the statute superseded the requirement of interest payment on funds on deposit in such banks, and that such funds might lawfully be deposited in banks not paying interest thereon.  This holding was limited to banks which are members of the Federal Reserve System, 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, 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, based upon section 177 of the Judicial Code:  

* * * we should begin with the premise, well established by the authorities, that a recovery of interest  


45 Stat. 1184.  
48 Stat. 534.  
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 (22 U. S. C. 161c, 161d).  
22 Stat. 591.  
50 Stat. 654, 714-715.  
52 Stat. 1037.  
270 U. S. 476, 487 (1926).  

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."

G. CREDITOR'S 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.

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, or upon degradations.  General legislation on depreciation 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.  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, 1893, by deducting such sums from tribal funds, having due regard for the educational and other necessary requirements of the tribe or tribes affected.

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, or by lawful action of the tribe itself.

For an example of such expression see United States v. Blackfeather, 155 U. S. 180 (1894), revg. Blackfeather v. United States, 25 C. C. 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." ) (1908).


Act of August 5, 1882, 22 Stat. 728 (Kansas); Act of April 4, 1888, 25 Stat. 79 (Potawatomi); Act of May 27, 1892, 28 Stat. 207 (Mesopotamia).

Act of March 3, 1893, 28 Stat. 181; for a discussion of the responsibility of tribes for degradations, see Chapter 14, sec. 3, 6.


To the extent 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: Casing of the Potawatomi Indians, 6 Op. A. G. 49 (1873); Contracts of Indians, 6 Op. A. G. 402 (1874).

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.  In this section

The right of an Indian tribe to receive funds, apart from agreement, by reason of torts committed against it, is treated elsewhere, in

we shall attempt to determine the principal sources of tribal rights to income, and to analyze the manner in which such payments are handled.

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 1851, when the first general leasing law was enacted, was paid to the tribal nation by the United States. Failure to appreciate the basis of such payments helped to create the popular misimpression that all payments were made by the United States to the Indians were matters of charity. An illustration of this sentiment is found in section 3 of the Act of June 22, 1874, 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 indemities due from a foe in war. The fact that such payments were often viewed by the public and by many administrators helps to explain some of the bitter controversies which formerly were decided in 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.

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.

Ordinarily payments promised in a treaty and paid in annual installments called annuities 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. 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 saved the Federal Government from the necessity of making difficult adjudications that might lead to dissatisfaction. On the other hand, payments to tribal authorities sometimes led to worse dissatisfaction in the part of Indian tribal 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. 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.

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

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, 1869, 2 Stat. 407; Act of March 22, 1865, 3 Stat. 517 ("annually, for ever"); Act of January 9, 1837, 2 Stat. 135; Act of March 2, 1811, 2 Stat. 690 ("the hundred dollars * * * to be paid annually to the aboriginals; which annuities shall be perpetual").

This was to 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 authority. Treaty of September 3, 1836, with the Measomone Nation of Indians, 7 Stat. 495; 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 reserved the right to appropriate annuities among the different bands or tribes with which a single treaty was concluded, but reserving no similar right to the moneys due to the tribe. Treaty of June 27, 1853, with the Comanches, Kiowas, 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. 1100.

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 Punskeashaw, 7 Stat. 100. In the Treaty of January 8, 1821, with the Chocataw, 7 Stat. 210, per capita distribution promised in order to remove "any discontent which may have arisen in the Chocataw Nation, in consequence of six thousand dollars of their annuity having been appropriated annually, for sixteen years, by the distribution of the same, amongst the individuals of that nation." Other treaties promising equal distribution are: Treaty of October 4, 1842, with the Chipewa Indians of the Mississippi and Lake Superior, 7 Stat. 591; Treaty of January 9, 1845, with the Cree and Chippewa Tribes of Indians, 9 Stat. 821; Treaty of March 17, 1842, with the Wyandot Nation of Indians, 11 Stat. 581. Later treaties generally reserved a larger share of the tribal moneys, promised in order to prevent the United States from determining 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 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 Dikate and others of the Indians in Territory of Washington, 12 Stat. 927; Treaty of January 29, 1855, with the Kickapoo Indians, 12 Stat. 932; Treaty of January 31, 1855, with the Mahak tribe of Indians, 12 Stat. 930; Treaty of June 20, 1855, with the Confederate tribes of Indians in Middle Oregon, 12 Stat. 933; Treaty of July 1, 1855, with the Dikate and others of the Indians in Territory of Washington, 12 Stat. 971; Treaty of February 18, 1861, with the Confederated tribes of Northwest and Chippewa Indians, 12 Stat. 1163; Treaty of March 8, 1865, with the Omaha Tribe of Indians, 14 Stat. 667; Treaty of September 20, 1865, with the Great and Little Osage Indians, 14 Stat. 687; Treaty of March 2, 1866, with the Ute Indians, 15 Stat. 819.

See, for example: Treaty of September 29, 1837, with the Sioux Nation of Indians, 7 Stat. 338; Treaty of October 18, 1848, with the
TRIBAL RIGHT TO RECEIVE FUNDS

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. Occasionally an Indian treaty provided for complete per capita distribution of tribal funds. 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.

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. Frequently specific provision is made covering the interest to be paid upon the fund and covering also the purposes for which such fund and 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.

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. 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.

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.

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 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.

The proviso represents a well-established tendency to devote recoveries from judgments in claim cases to the rebuiding 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.

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


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

Monomet Tribe of Indians, 9 Stat. 652; Treaty of May 10, 1854, with the Shawnees, 10 Stat. 1007; Treaty of June 19, 1858, with the Moundwanakon and Waapsakota bands of the Sioux tribe of Indians, 12 Stat. 1031; Treaty of June 19, 1858, with the Moundwanakon and Waapsakota bands of the Sioux tribe of Indians, 12 Stat. 1035; Treaty of May 13, 1856, with the Otoes and Missourias, 9 Stat. 653; Treaty of May 13, 1856, with the Otoes and Missourias, 10 Stat. 1035; Treaty of May 13, 1856, with the Otoes and Missourias, 10 Stat. 1035.

Tribal Right to Receive Funds

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. Occasionally an Indian treaty provided for complete per capita distribution of tribal funds. 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.

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. Frequently specific provision is made covering the interest to be paid upon the fund and covering also the purposes for which such fund and 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.

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. 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.

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.

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 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.

The 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.

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


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

Monomet Tribe of Indians, 9 Stat. 652; Treaty of May 10, 1854, with the Shawnees, 10 Stat. 1007; Treaty of June 19, 1858, with the Moundwanakon and Waapsakota bands of the Sioux tribe of Indians, 12 Stat. 1031; Treaty of June 19, 1858, with the Moundwanakon and Waapsakota bands of the Sioux tribe of Indians, 12 Stat. 1035; Treaty of May 13, 1856, with the Otoes and Missourias, 9 Stat. 653; Treaty of May 13, 1856, with the Otoes and Missourias, 10 Stat. 1035; Treaty of May 13, 1856, with the Otoes and Missourias, 10 Stat. 1035.

Tribal Right to Receive Funds

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. Occasionally an Indian treaty provided for complete per capita distribution of tribal funds. 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.

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. Frequently specific provision is made covering the interest to be paid upon the fund and covering also the purposes for which such fund and 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.

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. 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.

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.

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 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.

The 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.

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
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, authorize the President to require that payments and deliveries be made by the various superintendents, permit payment of annuities in coin, or goods (at the request of the tribe), authorize Indians 18 years of age or over to receive annuities, require the Secretary of the Interior to designate disbursing officers handling per capita payments, extend these safeguards to the payment of judgment moneys, require the presence of the “package” when goods are distributed, and require reports as to the status of tribal fiscal affairs generally, reimbursable accounts, and attendance records for the occasions when goods are distributed.

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, 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 the convenient reach of the Indians, nor until the chiefs and headmen of the tribe 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 3, 1867, 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 in effect, forbids delivery of goods pursuant to treaty to chiefs who have violated a treaty.

We have already noted that the Act of June 22, 1874, 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, 1873, 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. 448.)

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 lands.

The Appropriation Act of March 3, 1877, 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, 1897, 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 tribes concerned.

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, and section 1 of the Act of June 30, 1919. The report of the distribution features of the latter statute by the Act of June 24, 1923, parallels the termination of the allotment policy.

---

TRIBAL RIGHT TO EXPEND FUNDS

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.  


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 statutes 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."

Other statutes provided for the expenditure of tribal funds for objects designated or approved by the tribal council concerned. Perhaps the earliest of such provisions is found in section 3 of the Appropriation Act of February 17, 1879, 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 and made permanent by the Act of March 1, 1907.

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, tribal delegates, and tribal attorneys.

There are, of course, a great number of statutes authorizing the expenditure of tribal funds without express reference to the wishes of the tribe, and the problem of federal power to expend tribal funds without Indian consent is dealt with elsewhere. It may be noted, however, that the omission of 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 tribal 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. 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.

The history of Indian appropriation legislation shows a continuous struggle between two principles: on the one hand, it is June 28, 1906, 34 Stat. 647 (Meatlock); Act of May 26, 1920, 41 Stat. 220 (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, 1927, 19 Stat. 221 (Onaga). The cost of various improvements upon tribal lands has been met out of tribal funds, sometimes with a provision that the cost of the improvements shall be repaid to the tribe by the individual Indian benefited. Act of March 3, 1921, sec. 2, 41 Stat. 1355, 1357 (Red Lake Indian Reservation).

Federal appropriations for improvements upon tribal lands have frequently been made in reimbursement of obligations against future tribal funds, or against such funds as might arise from disposal of the lands improved. Act of July 8, 1918, 39 Stat. 533 (Quinault Indian Reservation); Act of March 3, 1921, sec. 2, 41 Stat. 1355, 1357 (Fort Belknap); Act of February 14, 1925, 42 Stat. 1246 (Painte); 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. 327 (Red Lake Indians); cf. Joint Resolution of February 11, 1860, 26 Stat. 668.

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, 1925, 49 Stat. 244 (Crow).

Between 1918 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. 928 (Navajo); Act of June 7, 1924, 43 Stat. 607 (Navajo); Act of February 20, 1925, 43 Stat. 964 (Navajo).

See Chapter 5, secs. 5B, 10.

Funds other than trust funds may be expended without such authorization. See Chapter 5, sect. 10.

See 29 U. S. C. 159, 140.
TRIBAL PROPERTY

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 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 in the custody of a local superintendent and therefore technically under the Permanent Appropriation Repeal Act of June 28, 1934, within the Treasury of the United States. The Act of June 25, 1938, specifically provides:

That section 20 of the Permanent Appropriation Repeal Act, approved June 25, 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. 1162).

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 and more general statute 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 a 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. 20

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 real estate 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...
TRIBAL RIGHT TO EXPEND FUNDS

with respect to the disposition of tribal monies and other personality, we may briefly note:

(1) Limitations contained in tribal constitutions.

(2) Limitations contained in tribal charters.

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:

(a) To deposit all Tribal Council Funds to the credit of the Hualapai Tribe in an individual Indian Muters Account, Hualapai Tribe of the Tuzerton Caudal Aany, 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.

Bylaws of the Hualapai Tribe of the Hualapai Reservation, Arizona

ARTICLE 1—DUTIES OF OFFICERS.

Sec. 4. Treasurer.—The Treasurer shall accept, receive, keep, 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 and custody, at such times as 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 Commissioners of Indian Affairs may direct. The Treasurer shall be held responsible for all funds in his custody and be subject to the following limitations:

(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:

5. No distribution of corporate property to members shall be made except out of net income.

(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. 1153), as amended, under the general supervision of the Commissioner of Indian Affairs, or to make loans to the tribe or to individuals, corporations, or associations of the tribe, or to any other governmental agency, or from any member or association of the tribe, or to any person, association, or corporation, for any project or purpose, or for any public or private enterprise, to loan money thus borrowed to individual members or associations or corporations of the tribe, or to any other governmental agency, or for any public or private enterprise, or to repay loans made to the tribe, or to individual members or associations or corporations of the tribe, or to any other governmental agency, or for any public or private enterprise; 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.

(1) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this chapter, 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.

(2) To pledge or assign chattels or future income due to or 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 exist more than 10 years from the date of execution and shall not cover more than one-fourth 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.

(3) 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.

See Chapter 12, sec. 6.

See Chapter 12, sec. 6.

See Chapter 12, sec. 6.

See Chapter 12, sec. 6.