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FEDERAL INDIAN LAW**

1982 EDITION

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The majority of Indian lands passed from native ownership under the allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900.¹⁰³ Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, a loss of 90 million acres.¹⁰⁴ Of this, about 27 million acres, or two-thirds of the total land allotted, passed from Indian allottees by sale between 1887 and 1934.¹⁰⁵ An additional 60 million acres were either ceded outright or sold to non-Indian homesteaders and corporations as "surplus" lands.¹⁰⁶

Disposition of Tribal Funds

Individualizing ownership of tribal land was but one of the goals of assimilationists; the apportionment of tribal funds also received attention. Prior to the allotment period, tribal funds were treated as belonging to all tribal members. For example, the Act of March 3, 1883, required that earnings from leases and from the sale of reservation products be deposited to the credit of the entire tribe.¹⁰⁷ Four years later Congress authorized the Secretary of the Interior to expend these funds for the tribe's benefit.¹⁰⁸ The General Allotment Act of 1887 provided that funds from the sale of surplus lands be credited to the tribe ceding the lands.¹⁰⁹ These funds were subject to congressional appropriation for education and civilization of the credited tribe.

The Act of March 2, 1907, entitled "An Act providing for the allotment and distribution of Indian tribal funds," applied the principles of the General Allotment Act to tribal funds.¹¹⁰ Section 1 of the Act authorized the Secretary to allot to Indians deemed capable of managing their own affairs, upon application, a pro rata share of tribal funds. Section 2 authorized payment under the Secretary's direction of pro rata shares for the benefit of Indians mentally or physically disabled. Tribal consent was not required.

Commissioner Sells's policy of 1917 to end wardship included the apportionment and distribution of tribal funds to Indians deemed competent.¹¹¹ Commissioner Sells also allowed direct payment of tribal monies to individual adult Indians judged competent. Cash was disbursed in large sums by the superintendents from funds deposited under their supervision.¹¹²

¹⁰³ D. OTIS, *supra* note 9, at 87.

¹⁰⁴ *Id.* at 17.

¹⁰⁵ W. WASHBURN, *RED MAN'S LAND*, *supra* note 69, at 145; OFFICE IND. AFF., U.S. DEPT. OF INTERIOR, 10 REP. ON LAND PLANNING 6 (Washington: Government Printing Office, 1935). Tribes generally received remuneration at the rate of \$1.25 per acre.

¹⁰⁶ *Id.*

¹⁰⁷ Ch. 141, § 1, 22 Stat. 582, 590 (codified as amended at 25 U.S.C. § 155).

¹⁰⁸ Appropriations Act of Mar. 2, 1887, ch. 320, § 1, 24 Stat. 449, 463 (codified as amended at 25 U.S.C. § 155). After 1916 no money was to be expended from tribal funds without specific appropriations by Congress, except for education, equalization of allotments, and per capita and other payments. Appropriations Act of May 18, 1916, ch. 125, § 27, 39 Stat. 123, 158 (codified at 25 U.S.C. § 123).

¹⁰⁹ Ch. 119, § 5, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 348).

¹¹⁰ Ch. 2523, 34 Stat. 1221 (codified as amended at 25 U.S.C. §§ 119, 121).

¹¹¹ 2 DEPT. INT. ANN. REP. 3-4 (1917) (Comm'r Ind. Aff. Ann. Rep.).

¹¹² 2 DEPT. INT. ANN. REP. 50 (1920) (Comm'r Ind. Aff. Ann. Rep.).

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¹¹³ Ch. 86,

¹¹⁴ Author
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¹¹⁵ Ch. 29,

¹¹⁶ Comm'r
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¹¹⁷ Comm'r

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¹¹⁸ See 18

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¹¹⁹ See D.

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¹²¹ See 80

82, at 212.

The Appropriations Act of May 25, 1918, was another sweeping effort of the period to dissolve Indian tribes and tribal property.¹¹³ Section 28 authorized the Secretary of the Interior to segregate all tribal funds held in trust by the United States. A pro rata share was to be apportioned and paid to each member of the tribe. Implementation of these provisions required a final roll of tribal members entitled to participate in the division.¹¹⁴ Neither application by individual Indians nor tribal consent was required for the Secretary to convert these funds into individual Indian monies.

Administrative discretion was narrowed by the Act of March 3, 1927, which provided that rentals, royalties, and bonuses from oil and gas mining be deposited to the credit of the concerned tribe.¹¹⁵ Credited funds were subject to appropriation by Congress. This new direction in Indian legislation required that the "Indians, or their tribal council, shall be consulted in regard to the expenditure of such money."

h. Education and Assimilation

Assimilationists wished to civilize the Indians and drive them into the mainstream of American society. Thus it was desirable to end the tribe as a separate political and cultural unit, destroy the Indians' own heritage, and replace it with the white Americans' heritage. Official policy reflected this attitude; in 1889 the Commissioner of Indian Affairs wrote, "The American Indian is to become the Indian American."¹¹⁶

Education was viewed as an important tool; schooling was intended to provide Indian children with a substitute for a civilized homelife.¹¹⁷ Commissioner Morgan's policy replaced the Indians' own history, legends, heroes, songs, and language with those of white Americans.¹¹⁸ Little education or vocational training was provided for adult allottees.¹¹⁹ Instead, education was aimed primarily at Indian youth, who were considered the hope for the Indians' future.¹²⁰

Education for Indians was provided by mission schools in the early days of the nation.¹²¹ Beginning in 1870 the government contracted with

¹¹³ Ch. 86, § 28, 40 Stat. 561, 591 (repealed 1938) (formerly codified at 25 U.S.C. § 162 (1934)).

¹¹⁴ Authorization was conferred by the Appropriations Act of June 30, 1919, ch. 4, § 1, 41 Stat. 3, 9 (codified at 25 U.S.C. § 163).

¹¹⁵ Ch. 299, § 2, 44 Stat. 1347 (codified at 25 U.S.C. § 398b).

¹¹⁶ COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 51st Cong., 2d Sess. VI (1890) [hereinafter cited as 1890 COMM'R REP.]. See 1889 COMM'R REP., *supra* note 39; COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 52d Cong., 1st Sess. (1891).

¹¹⁷ COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 50th Cong., 2d Sess. XIX (1888). On Indian education policy today, see Ch. 13, Sec. B *infra*.

¹¹⁸ See 1890 COMM'R REP., *supra* note 116, at CLXVII-XIX. See also SPECIAL SUBCOMM. ON INDIAN EDUCATION, INDIAN EDUCATION: A NATIONAL TRAGEDY — A NATIONAL CHALLENGE, S. REP. NO. 501, 91st Cong., 1st Sess. 146-52 (1969) [hereinafter cited as SUBCOMM. ON INDIAN EDUCATION].

¹¹⁹ See D. OTIS, *supra* note 9, at 64-81.

¹²⁰ 1889 COMM'R REP., *supra* note 39, at 94-96; 1890 COMM'R REP., *supra* note 116, at CXXXVI.

¹²¹ See SUBCOMM. ON INDIAN EDUCATION, *supra* note 118, at 140-42; L. SCHMECKEBIER, *supra* note 82, at 212.

although in practice Congress leaves much governing authority to the tribes, federal power over Indians is "plenary" in the sense that in Indian matters Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers.

2. The Trust Responsibility

a. Development of the Doctrine

The concept of a federal trust responsibility to Indians evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*.²⁴ *Cherokee Nation* was an original action filed by the tribe in the Supreme Court to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, although a "distinct political society" and thus generically a "state,"²⁵ was neither a state of the United States nor a foreign state²⁶ and therefore was not entitled to bring the suit initially in the Court.²⁷ Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage" and that "[t]heir relation to the United States resembles that of a ward to his guardian."²⁸

The Court's subsequent decision in *Worcester v. Georgia*²⁹ reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship. Later in the nineteenth century, the Court in *United States v. Kagama*³⁰ relied on the guardianship theory as a separate and distinct basis for congressional power over Indians, but this reasoning has not been followed.³¹

As the following sections indicate, during the twentieth century the trust principles articulated in *Cherokee Nation v. Georgia* have been applied in many specific situations to establish and protect rights of Indian tribes and individuals. Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust respon-

New Mexico, 426 U.S. 529 (1976), but that power has been used sparingly. See Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976). Even in regard to lands held pursuant to U.S. CONST. art. I, § 8, cl. 17, which are described as areas under exclusive federal jurisdiction, Congress has legislated much less extensively than in regard to Indian reservations. See generally INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART I: THE FACTS AND COMMITTEE RECOMMENDATIONS 49-50 (1956), quoted in Engdahl, *supra*, at 379 n.444.

²⁴ 30 U.S. (5 Pet.) 1 (1831).

²⁵ *Id.* at 16.

²⁶ *Id.* at 16, 19-20.

²⁷ See Ch. 6, Sec. A, note 279 *infra*.

²⁸ 30 U.S. (5 Pet.) at 17.

²⁹ 31 U.S. (6 Pet.) 515 (1832).

³⁰ 118 U.S. 375 (1886).

³¹ See Sec. A, note 22 *supra*. The trust responsibility has not been cited as an independent source of congressional power since *United States v. Candelaria*, 271 U.S. 432 (1926).

sibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.

b. The Trust Responsibility as a Limitation on Congressional Power

(1) The "Tied Rationally" Standard

In addition to the constitutional limitations on Congress' power to implement its trust responsibility,³² the Court has observed that the guardianship "power to control and manage" is also "subject to limitations inhering in such a guardianship,"³³ although the cases do not clarify with precision what limitations on Congress "inher[e] in a guardianship."³⁴ As noted above,³⁵ however, recent cases have suggested that the trust obligation of the United States is also a limiting standard for judging the constitutional validity of an Indian statute, rather than solely a source of power. In *Morton v. Mancari*³⁶ the Supreme Court stated: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."³⁷

Although the Court has never spoken directly to the issue, the requirement of a rational tie between an Indian statute and the fulfillment of the trust relationship seems to impose substantive limitations on Congress. This standard, in practice, does not allow a reviewing court to second guess a particular determination by Congress that a statute is an appropriate protection of the Indians' interests. Congressional discretion is necessarily broad in that respect. Nor does this mean that Congress could never pass a statute adverse to the best interests of the Indians. Congress can, for example, authorize the exercise of eminent domain over Indian property.³⁸ However, where Congress is exercising its authority over Indians rather than some other distinctive power, the trust obligation apparently requires that its statutes be based on a determination that the Indians will be protected. Otherwise, such statutes would not be rationally related to the trustee obligation.³⁹

(2) Canons of Construction

The trust obligation of the United States also constrains congressional power in a procedural manner. Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.

The primary canons of construction in Indian law were first developed in

³² See text at notes 1-23 *supra*.

³³ *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

³⁴ The case law does establish strict and precise limitations on federal executive power based on the trustee obligations. See text at notes 71-95 *infra*.

³⁵ See text at notes 12-19 *supra*.

³⁶ 417 U.S. 535 (1974).

³⁷ *Id.* at 555. See also *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), discussed in text at notes 13-14 *supra*.

³⁸ See Ch. 9, Sec. A1e *infra*.

³⁹ See text at notes 33-37 *supra*.

cases involving treaties. In construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians,⁴⁰ that ambiguous expressions in treaties must be resolved in favor of the Indians,⁴¹ and that treaties should be construed as the Indians would have understood them.⁴² These precepts represent an acknowledgment of the unequal bargaining position, based partially on the United States' superior negotiating skills and knowledge of the language.⁴³ One consequence of this is that many important protections have been held by the courts to be reserved implicitly by treaties. For example, important resource rights such as reserved water rights⁴⁴ and the right to hunt and fish⁴⁵ are implied from treaties and agreements by which Indian reservations were created. Similarly, the reservation of tribal self-government free of state jurisdiction was initially derived by implication from treaties.⁴⁶

The Supreme Court has repeatedly held that Congress can abrogate a treaty provision unilaterally without consent of the tribe⁴⁷ even to the point of terminating entirely the trust obligation.⁴⁸ The Court has, however, developed a number of special rules concerning construction of Indian treaties which, taken together, create a strong presumption that treaty rights have not been abrogated or modified by subsequent congressional enactments.⁴⁹ These rules,

⁴⁰ *E.g.*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

⁴¹ *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

⁴² *E.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). This principle was first articulated in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832).

⁴³ *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Treaties have been analogized to adhesion contracts. *Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogations, etc.*, 63 CALIF. L. REV. 601, 617 (1975).

⁴⁴ *Winters v. United States*, 207 U.S. 564 (1908). The Winters doctrine is discussed in Ch. 10, Sec. B *infra*.

⁴⁵ *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), discussed in text at notes 50-53 *infra*.

⁴⁶ *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593-95 (1832). See generally Ch. 4 *infra*. Under the Supremacy Clause a treaty provision supersedes any inconsistent state statute or constitutional provision. *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880).

⁴⁷ *E.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 534, 594 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). This principle is criticized in Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227-29 (1975).

⁴⁸ In dissolving the federal relationship with a tribe Congress may also provide for the liquidation and distribution of tribal property. *United States v. Seminole Nation*, 299 U.S. 417 (1937). See also *United States v. Nice*, 241 U.S. 591, 598 (1916). But the court will not assume that Congress abdicated its powers over the tribe or its property, without a clear expression of that intent. *Chippewa Indians v. United States*, 307 U.S. 1 (1939); *United States v. Boylan*, 265 F. 165, 171 (2d Cir. 1920). Termination of the trust relationship by Congress would seem constitutional, at least if accompanied by a determination by Congress that it is in the Indians' best interests and thus represents a proper exercise of the trusteeship powers. In two recent cases, the Supreme Court has construed termination statutes without suggesting that unilateral termination would present constitutional difficulties. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). The Court of Appeals for the Ninth Circuit has held a termination act to be constitutional. *Crain v. First Nat'l Bank*, 324 F.2d 532 (9th Cir. 1963).

⁴⁹ See generally *Wilkinson & Volkman, supra* note 43.

variously stated, establish that Congress must show a "clear and plain" intention to abrogate Indian treaty rights.

A leading recent case is *Menominee Tribe v. United States*,⁵⁰ in which the Supreme Court held that a 1954 statute terminating the federal trust relationship with the Menominee Tribe⁵¹ did not nullify the treaty rights of tribal members to hunt and fish on the reservation free from state regulation.⁵² The Court emphasized that the termination Act contained no "explicit statement" abrogating the hunting and fishing rights, and that such an intention would not be "lightly imputed to the Congress."⁵³ This language in *Menominee Tribe* was expressly reaffirmed in *Washington v. Fishing Vessel Ass'n*⁵⁴ where the Court rejected an asserted treaty abrogation, stating that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . ."⁵⁵

The requirements for how such a "clear and plain" expression of intent must be demonstrated are not definitively articulated in the cases. Although a few cases have required that an intention to modify treaty rights must be stated in the language of the statute,⁵⁶ the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute. In two recent cases involving alteration of reservation boundaries by statutes opening "surplus" tribal lands to settlement, for example, the Supreme Court relied upon the legislative history and "surrounding circumstances" of the opening statutes to find an intention to alter treaty and statutory boundaries.⁵⁷

Similar rules of construction have been applied to situations which do not involve treaties. The essential policy for the development of the canons in treaty cases was not based on the form of the transaction, a treaty, but rather

⁵⁰ 391 U.S. 404 (1968).

⁵¹ Menominee Indian Termination Act of 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891-902 (1970)).

⁵² *Menominee Tribe* is instructive on another point of the rules of construction concerning Indian treaties. The 1854 treaty being construed did not contain an express right to hunt and fish on the reservation. The Supreme Court, however, implied such a right from the clause that the lands are to be held "as Indian lands are held," 391 U.S. at 405-06. See Treaty with the Menomonees, May 12, 1854, art. 2, 10 Stat. 1064, 1065.

⁵³ 391 U.S. at 413. *Accord*, *United States v. Winans*, 198 U.S. 371 (1905).

⁵⁴ 443 U.S. 658 (1979).

⁵⁵ *Id.* at 690.

⁵⁶ *E.g.*, *Frost v. Wenie*, 157 U.S. 46, 60 (1895); *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 740 (1875). See *United States v. White*, 508 F.2d 453, 456-58 (8th Cir. 1974) (hunting of eagles); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005-06 (D. Minn. 1971) (tribal fishing, hunting, and gathering rights). A convincing argument has been made that the courts should explicitly adopt this standard, thereby promoting clarity and maximizing the protections afforded by Indian treaties. *Wilkinson & Volkman*, *supra* note 43, at 645-59.

⁵⁷ *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) ("A canon of construction . . . [that is,] the rule by which legal ambiguities are resolved to the benefit of the Indians . . . is not a license to disregard clear expressions of tribal and congressional intent."). See also *Seneca Nation v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959) (condemnation of land to build a dam on reservation). These cases, however, illustrate the uncertainty of this rule, since the result in any particular case will turn on the weight a reviewing court puts on different indicia of intent in the relevant legislative history. Compare *Rosebud Sioux Tribe v. Kneip* with *Mattz v. Arnett*, 412 U.S. 481 (1973). See *Wilkinson & Volkman*, *supra* note 43, at 634-45.

was rooted in the special trust relationship between the United States and Indian tribes.⁵⁸ In addition, in implementing the federal-tribal relationship Congress has not drawn distinctions between treaty tribes and nontreaty tribes.⁵⁹

Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights.⁶⁰ This applies, for example, to the recognition of hunting and fishing rights⁶¹ and water rights,⁶² and to exemptions from exercises of state taxing authority.⁶³

Once powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights. The principle of a "clear and plain statement" before Indian treaty rights can be abrogated⁶⁴ also applies in nontreaty contexts. An important case, not involving treaty construction, is *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*.⁶⁵ The United States as trustee for the tribe sued to enjoin the railroad from interfering with Indian occupancy of lands held under aboriginal title. The Court held that the Indians' title could not be extinguished except by a "clear and plain" expression of intent by Congress.⁶⁶

Two recent cases highlighted the manner in which the canons of construction operate in cases where treaty rights are not involved. In *Bryan v. Itasca County*,⁶⁷ Indians' right to be free of state taxation jurisdiction in Indian country was upheld in spite of the provisions of Public Law 280, which provided for the extension of many state laws into Indian country.⁶⁸ The Indian Civil Rights Act,⁶⁹ which applied many provisions of the Bill of Rights to tribes in the exercise of self-government, was construed strictly in *Santa Clara Pueblo v. Martinez*⁷⁰ to limit the availability of federal judicial review of tribal action.

The rules for construing federal statutes in Indian affairs have a pervasive influence in Indian law. The canons are variously phrased in different contexts,

⁵⁸ See, e.g., *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith").

⁵⁹ For congressional policy after the end of treaty making with Indian tribes in 1871, see Ch. 2, Sec. C1 *supra*.

⁶⁰ The only apparent exception to the extension of treaty rules of construction to nontreaty situations involves the rule that treaties should be construed as the Indians would have understood them. See text at note 43 *supra*. That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders and statutes, neither of which directly involved negotiations with the tribes.

⁶¹ See, e.g., *Antoine v. Washington*, 420 U.S. 194 (1975) (executive order and agreement).

⁶² See, e.g., *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964) (executive orders); *Winters v. United States*, 207 U.S. 564 (1908) (agreement).

⁶³ See, e.g., *Choate v. Trapp*, 224 U.S. 665 (1912) (agreement and statute).

⁶⁴ See text at notes 43-50 *supra*.

⁶⁵ 314 U.S. 339 (1941).

⁶⁶ *Id.* at 353.

⁶⁷ 426 U.S. 373 (1976).

⁶⁸ *Id.* at 379. See Ch. 6, Sec. C3a *infra*.

⁶⁹ See Ch. 12, Sec. E *infra*.

⁷⁰ 436 U.S. 49 (1978).

but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. These canons play an essential role in implementing the trust relationship between the United States and Indian tribes and are involved in most of the subject matter of Indian law.

c. The Trust Responsibility as a Limitation on Federal Administrative Power

In general, the ordinary principles and procedures of federal administrative law apply to dealings of federal executive agencies with Indians. In Indian matters, as in others, federal executive officials are limited to the authority conferred on them by statute.⁷¹ The "presumption of reviewability" also applies to federal actions affecting Indians.⁷² The lawfulness of executive officials' actions may be reviewed in suits either for money damages⁷³ or for equitable or other relief.⁷⁴ The Administrative Procedure Act⁷⁵ applies to acts of federal officials affecting Indians.⁷⁶

In addition, the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies — unless, of course, Congress has expressly authorized a deviation from these standards in exercise of its "plenary" power. Since the trust obligations are binding on the United States, these standards of conduct would seem to govern all executive departments that may deal with Indians, not just those such as the Bureau of Indian Affairs which have special statutory responsibilities for Indian affairs.⁷⁷ Moreover, in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies.⁷⁸

⁷¹ See generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); 5 U.S.C. § 706(2)(C); 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 30.09-10 (St. Paul: West Publishing Co., 1958). See also *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962).

⁷² See *Tooahnippah v. Hickel*, 397 U.S. 598 (1970). See generally *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁷³ The Court of Claims has jurisdiction over certain claims against the United States for money damages. 28 U.S.C. §§ 1491, 1505. See Ch. 9, Sec. E *infra*. The Indian Claims Commission Act provided a forum in which tribes, bands, or identifiable groups of Indians could seek compensation for wrongs done by the United States before 1946. 25 U.S.C. §§ 70-70v-3. See Ch. 9, Sec. E *infra*.

⁷⁴ The sovereign immunity of the United States has been waived for suits seeking declaratory and equitable relief. 5 U.S.C. §§ 702, 703. See Ch. 6, Sec. A4a(1) *infra*. Sovereign immunity had been a significant bar to some actions by Indians. See *Morrison v. Work*, 266 U.S. 481 (1925); *Scholder v. United States*, 428 F.2d 1123 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970). However, it has been established that Indian tribes can sue federal officers for acts outside their statutory authority. See *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). Tribes, however, remain immune from suit. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940). See Ch. 6, Sec. A4c *infra*.

⁷⁵ 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

⁷⁶ See *Morton v. Ruiz*, 415 U.S. 199 (1974); *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

⁷⁷ *E.g.*, *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). See generally *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976).

⁷⁸ See *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). A leading authority on federal administrative law has suggested that *Ruiz* imposes more extensive procedural requirements on the Bureau of Indian Affairs than are customary for other federal agencies. Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823 (1975).

The federal trust responsibility is a very important limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is *United States v. Creek Nation*,⁷⁹ in which the Supreme Court affirmed the Court of Claims award to a tribe of money damages against the United States for lands excluded from their reservation and sold to non-Indians following an incorrect federal survey of reservation boundaries. The Court based its decision on the federal trust doctrine:

The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.⁸⁰

Creek Nation stands for the proposition that — unless Congress has directed otherwise — the federal executive is held to a strict standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot as a result of a negligent survey "give the tribal lands to others, or . . . appropriate them to its own purposes."⁸¹ Other decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards,"⁸² and to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."⁸³ Court decisions have also held that the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property⁸⁴ or federal programs.⁸⁵

⁷⁹ 295 U.S. 103 (1935).

⁸⁰ *Id.* at 109-10 (emphasis added).

⁸¹ *Id.* at 110.

⁸² *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). In this case particularly, the Court imposed the fiduciary obligations of private trustees on federal officials dealing with Indians. *Id.* at 297 n.12.

⁸³ *United States v. Payne*, 264 U.S. 446, 448 (1924).

⁸⁴ *E.g.*, *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct. Cl. 1966); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19-20 (1944); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

In *Menominee Tribe* the court discussed a special jurisdictional statute providing that "the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary," and found that it "add[ed] little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." 101 Ct. Cl. at 18-19.

Navajo Tribe concerned the trustee's duty of loyalty. During World War II an oil company leased tribal land for oil and gas purposes. Upon discovering helium bearing, noncombustible gas on the land which it had no desire to produce, the company assigned the lease to the U.S. Bureau of Mines, an agency of the Interior Department. The Bureau then developed and produced the helium under the terms of the assigned lease. The Court of Claims sustained the tribe's claim that the helium discovery should have been disclosed to it, the old lease surrendered, and a new, more remunerative lease negotiated. The court stated that "[t]he case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." 364 F.2d at 324.

⁸⁵ *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

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Creek Nation and several other cited cases were suits against the United States for money damages under special jurisdictional statutes in the Court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is *Lane v. Pueblo of Santa Rosa*,⁸⁶ where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws; this, the Court held, "would not be an exercise of guardianship, but an act of confiscation."⁸⁷ The Court in *United States v. Mason*⁸⁸ set the limits of the responsibility, stating that federal officials as trustees are not insurers. *Mason* sustained as reasonable a decision by the Interior Department not to question certain state taxes on trust property, which previous Supreme Court decisions had held were proper. The courts, moreover, in recent years generally have held executive action to be reviewable both under the terms of specific statutes and for breach of the obligations of an ordinary trustee, and have drawn on ordinary standards of trust law in deciding Indian cases.⁸⁹ While the cases have usually involved Indian property rights, as stated earlier the trust doctrine may not be limited to property.⁹⁰

The application of ordinary trust standards to federal officials is illuminated by a significant federal district court decision, *Pyramid Lake Paiute Tribe v. Morton*.⁹¹ There, the court struck down a regulation allowing certain diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court found them in violation of the trust responsibility. The court held that the Secretary of the Interior — as trustee for the tribe — was required by his trust responsibility to administer reclamation statutes in a manner which did not interfere with Indian rights.⁹² This outcome seems justified. Unless Congress has specifically directed that Indian property rights be taken, executive officials are obliged to adhere strictly to standard fiduciary principles. This includes a duty of loyalty and the corollary principle that a trustee should subordinate its own interests to those of its beneficiary.⁹³

Application of a duty of loyalty to administrative officials in their dealings with Indians is of particular importance because conflicts of interest between

⁸⁶ 249 U.S. 110 (1919).

⁸⁷ *Id.* at 113. Shortly thereafter, the Court voided a federal land patent conveying lands occupied by Indians to a railway. *Cramer v. United States*, 261 U.S. 219 (1923). The Court held that the federal trust responsibility toward Indians limited the general statutory authority of these executive officials to issue land patents: "Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory." *Id.* at 234.

⁸⁸ 412 U.S. 391, 398 (1973).

⁸⁹ *E.g.*, *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977), *aff'd*, 581 F.2d 697, 698 (8th Cir. 1978).

⁹⁰ See text at note 85 *supra*. See generally Chambers, *supra* note 47, at 1242-46.

⁹¹ 354 F. Supp. 252 (D.D.C. 1972).

⁹² *Id.* at 256-57.

⁹³ An ordinary trustee can resign in event of a conflict of interest while the federal executive cannot. The United States, however, can resolve such conflicts by specific congressional legislation. See Sec. B, text at note 24 *supra*.

Indian claims to natural resources and the programs and policies of agencies not directly responsible for Indian affairs frequently impede the faithful discharge of trust obligations to Indians by federal officials. Indian tribes have claims to land within national parks and forests and land which is regarded by the Bureau of Land Management as part of the public lands; to water which is coveted for non-Indian water, power, and flood control projects developed by the Bureau of Reclamation or Army Corps of Engineers or for development of energy resources; and to the exercise of hunting and fishing rights which may conflict with conservation goals set by federal and state agencies.⁹⁴ Non-Indians, of course, are more numerous and usually politically more powerful, so substantial political pressure can frequently be applied on executive officials to compromise or ignore Indian rights. This is particularly a problem in the Interior Department, where both the Bureau of Indian Affairs and other agencies with different interests are located. Judicial enforcement of ordinary fiduciary principles — by providing money damages after the fact or injunctive and declaratory relief beforehand — can give assurance that executive officials will protect Indian trust rights over conflicting public purposes except where specifically authorized to do otherwise by Congress.⁹⁵

⁹⁴ SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., A STUDY OF ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES (Comm. Print 1971) (R. Chambers, author).

⁹⁵ See generally *id.*

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We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.⁹⁵

Similarly, in *Menominee Tribe v. United States*⁹⁶ the Court held that tribal property rights, in this case, rights to hunt, were not abrogated by a statute terminating the federal trust responsibility to the tribe. The Court reiterated that an intent to abrogate Indian rights would not be "lightly imputed to Congress"⁹⁷ and found "it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty."⁹⁸

The rule in *Santa Fe Pacific* and *Menominee Tribe* that Congress must clearly and plainly authorize the taking of Indian trust property generally has been applied by lower federal courts to restrict the exercise of federal eminent domain power. These cases hold that for a condemnation to be effective, the statutes must specifically abrogate Indian rights. In *United States v. Winnebago Tribe*,⁹⁹ for example, the court of appeals held that various general Flood Control Acts did not authorize the Corps of Engineers to take tribal lands by eminent domain, noting that the language of the statutes and pertinent committee reports made no mention of the acquisition of the Indian lands in question. Cases in which statutes have been construed to authorize a taking of Indian rights protected by treaty or statute generally have required specific statements abrogating those rights in the language or legislative history of the enactment.¹⁰⁰ This rule of strict construction serves to prevent a further deterioration of the tribal land base. Nevertheless, in the forty years since enactment of the Indian Reorganization Act of 1934,¹⁰¹ 1,811,010 acres of Indian land have been taken by means of condemnation proceedings alone.¹⁰²

⁹⁵ *Id.* at 353-54 (footnote omitted).

⁹⁶ 391 U.S. 404 (1968).

⁹⁷ *Id.* at 413 (quoting *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)).

⁹⁸ *Id.* (footnote omitted).

⁹⁹ 542 F.2d 1002 (8th Cir. 1976). A similar holding was reached by the court in *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D.), vacated as moot sub nom. *United States v. Sioux Indians*, 259 F.2d 271 (8th Cir. 1958). But see *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Seneca Nation v. United States*, 338 F.2d 55 (2d Cir. 1964), cert. denied, 380 U.S. 952 (1965); *Seneca Nation v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959). See generally STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., REPORT ON LAW CONSOLIDATION, REVISION AND CODIFICATION 64-69 (Comm. Print 1976) (Task Force Nine) [hereinafter cited as Task Force Nine].

¹⁰⁰ E.g., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Seneca Nation v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959).

¹⁰¹ Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

¹⁰² Task Force Nine, *supra* note 99, at 125.

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be made directly to the Indians rather than to agents or attorneys.¹¹ In *Sac & Fox Indians v. Sac & Fox Indians*,¹² the Supreme Court held that individual members who separate from the tribe forfeit all legal claims to annuities. Justice Holmes noted that since the government did not deal with individual Indians but solely with tribes, individual rights generally were not created by treaty provisions calling for the payment of annuities.¹³ Indeed, the Court held that treaty provisions calling for payment of specified sums to the principal chiefs of the tribe were not a promise to the chiefs but to the tribe and therefore gave the chiefs no vested rights in the payments in question.

2. Tribal Funds and Securities

a. Sources of Tribal Income

The principal source of tribal income since the American Revolution has been tribally owned resources, chiefly land, timber, minerals, and water resources. Since sales of Indian resources were restricted largely to the United States government for more than a century, most tribal income received prior to 1891, when the first general leasing law was enacted,¹⁴ was paid to the tribes by the United States. Failure to appreciate the source of such payments helped to create a general misimpression that the payments made by the United States to Indians were a matter of charity. This sentiment is illustrated in section 3 of the Act of June 22, 1874, which provided that able-bodied male Indians receiving supplies pursuant to appropriations acts were to 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,"¹⁵ even when the appropriations were pursuant to United States treaty obligations.

In numerous treaties, agreements, and statutes the United States has agreed to pay money to Indian tribes as consideration for land cessions or other disposition of tribal property.¹⁶ Provision frequently was made that payment should go directly to the treasurer of the tribe.¹⁷ In other cases payments were to be made to chiefs,¹⁸ to heads of families,¹⁹ or per capita to all adult tribal members.²⁰ In some cases payment was to be made in goods or services.²¹

¹¹ Act of Aug. 30, 1852, ch. 103, § 3, 10 Stat. 41, 56.

¹² 220 U.S. 481 (1911).

¹³ *Id.* at 484.

¹⁴ Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 794, 795 (codified at 25 U.S.C. § 397).

¹⁵ Ch. 389, 18 Stat. 146, 176 (reenacted as permanent legislation by Act of Mar. 3, 1875, ch. 132, § 3, 18 Stat. 420, 449 (codified at 25 U.S.C. § 137)).

¹⁶ *E.g.*, Act of Aug. 26, 1922, ch. 295, 42 Stat. 832 (codified at 16 U.S.C. §§ 434, 435) (Agua Caliente Band); J. Res. 16, Mar. 31, 1894, 28 Stat. 579, 580 (Cherokee Nation); Treaty with the Rogue River Tribe, Sept. 10, 1853, art. 3, 10 Stat. 1018, 1019.

¹⁷ *See, e.g.*, United States v. Seminole Nation, 299 U.S. 417, 425-27 (1937).

¹⁸ *E.g.*, Treaty with Chippewas, Feb. 22, 1855, art. 3, 10 Stat. 1165, 1167; Treaty with the Delawares, May 6, 1854, art. 6, 10 Stat. 1048, 1049.

¹⁹ *E.g.*, Act of Mar. 3, 1847, ch. 66, § 3, 9 Stat. 202, 203 (codified as carried forward at 25 U.S.C. § 111). *See* 5 Op. Att'y Gen. 320 (1851) (Cherokees); 5 Op. Att'y Gen. 46 (1848) (Creeks), revised by 5 Op. Att'y Gen. 320 (1849) (Creeks).

²⁰ *E.g.*, Act of Aug. 30, 1852, ch. 103, § 3, 10 Stat. 41, 56 (codified as carried forward at 25 U.S.C. § 111). *See* 25 C.F.R. § 101.1 (1980).

²¹ *See, e.g.*, United States v. Omaha Tribe, 253 U.S. 275, 279-81 (1920). *See also* Act of June 30, 1834, ch. 162, § 12, 4 Stat. 735, 737 (codified at 25 U.S.C. § 115) (authorizing payment of annuities in goods at the request of any tribe).

Ordinarily, payments promised in a treaty and paid in annual installments called annuities²² were due directly to the tribe and, as obligations of one nation to another, were deemed satisfied when tribal authorities had received the funds.²³ Payments to tribal authorities saved the federal government from the necessity of making difficult judgments of eligibility among tribal members. Nevertheless, payments to tribal authorities sometimes created dissatisfaction among individual tribal members who considered themselves discriminated against or who felt the tribal leadership was corrupt. As a result, the United States sometimes reserved by treaty provisions the right to distribute the monies or goods owed to the tribe directly to tribal members.²⁴ Occasionally the treaty provided that distribution be made on the basis of an agreement between tribal authorities and agents of the federal government.²⁵

Per capita payments usually comprised only a portion of the funds due to a tribe. The remainder was invested or expended in other ways.²⁶ Occasionally an Indian treaty provided for complete per capita distribution of tribal funds.²⁷ After 1871 numerous statutes provided for per capita payment of tribal funds, particularly during the years following the General Allotment Act when individual distribution of property was viewed as an effective means of achieving assimilationist goals by weakening tribal organization.²⁸ Some of these statu-

²² Although it has long been the custom to make annual appropriations, Congress has made some appropriations to Indian tribes payable over extended periods. *E.g.*, Appropriations Act of Mar. 3, 1819, ch. 87, 3 Stat. 517, 518; Appropriations Act of Mar. 3, 1811, ch. 41, 2 Stat. 660; Appropriations Act of Apr. 21, 1806, ch. 53, 2 Stat. 407.

²³ The fact that the annuity debt was to be discharged by payment to the tribe was apparently so well understood that few provisions are found in the early treaties specifying how the annuity debt was to be paid. *Contra*, Treaty with the Menomones, Sept. 3, 1835, art. 2, 7 Stat. 506, 507. Other provisions indicated that the annuity debt was not discharged until payment was made to the tribe by providing that the United States reserved the right to apportion annuities among different tribes or bands involved in a single treaty without reserving the right to apportion within the tribe or band. *E.g.*, Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109; Treaty with the Camanches, Kiowas, and Apaches, July 27, 1853, 10 Stat. 1013.

²⁴ At first treaties simply provided that the United States might "divide the said annuity amongst the individuals of the said tribe." *E.g.*, Treaty with the Piankishaws, Dec. 30, 1805, art. 3, 7 Stat. 100, 101. In the Treaty with the Choctaws, Oct. 18, 1820, art. 8, 7 Stat. 210, 212, per capita distribution was promised in order to remove "any discontent which may have arisen in the Choctaw Nation, in consequence of six thousand dollars of their annuity having been appropriated annually, for sixteen years, by some of the chiefs, for the support of their schools." Later treaties generally reserved a more comprehensive right in the President of the United States to determine how monies due to the tribe should be paid to its members or expended for their use and benefit. *E.g.*, Treaty with the Utes, Mar. 2, 1868, 15 Stat. 619; Treaty with the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, and others, art. 6, Jan. 22, 1855, 12 Stat. 927, 928; Treaty with the Omahas, Mar. 16, 1854, art. 4, 10 Stat. 1043, 1044.

²⁵ *E.g.*, Treaty with the Sisseton and Wahpaton Bands of Dakotas or Sioux, June 19, 1858, art. 3, 12 Stat. 1037, 1038; Treaty with the Menomonees, Oct. 18, 1848, art. 5, 9 Stat. 952, 953; Treaty with the Sioux, Sept. 29, 1837, art. 2, 7 Stat. 538.

²⁶ *E.g.*, Treaty with the Yankton Sioux or Dacotahs, Apr. 19, 1858, art. 4, 11 Stat. 743, 744; Treaty with the Ottos and Missourias, Mar. 15, 1854, art. 4, 10 Stat. 1038, 1039; Treaty with the Med-ay-wa-kan-toan and Wah-pay-koo-tay Bands of Dakotas or Sioux, Aug. 5, 1851, art. 4, 10 Stat. 954.

²⁷ *E.g.*, Treaty with the Wyandotts, Jan. 31, 1855, art. 6, 10 Stat. 1159, 1162. See also note 24 *supra*.

²⁸ *E.g.*, Act of June 4, 1924, ch. 253, § 8, 43 Stat. 376, 378 (Eastern Band of Cherokees); Act of Mar. 3, 1909, ch. 253, § 3, 35 Stat. 751, 752 (Quapaws); Act of May 15, 1888, ch. 255, § 1, 25 Stat. 150 (repealed 1966) (Omahas).

annual installments as obligations of one authorities had received from federal government from among tribal members sometimes created considered themselves corrupt. As a result, the right to distribute among tribal members.²⁴ Occasionally on the basis of an federal government.²⁵ f the funds due to a ays.²⁶ Occasionally on of tribal funds.²⁷ ent of tribal funds, ent Act when indi- means of achieving come of these statu-

is, Congress has made Appropriations Act of 1, ch. 41, 2 Stat. 660;

tribe was apparently ying how the annuity t. 2, 7 Stat. 506, 507. ayment was made to ion annuities among it to apportion within 109; Treaty with the

de the said annuity s, Dec. 30, 1805, art. 7 Stat. 210, 212, per y have arisen in the g been appropriated ools." Later treaties States to determine air use and benefit. amish, Suquamish, ish, Snoqualmoo, 17, 928; Treaty with

June 19, 1858, art. t. 952, 953; Treaty

11 Stat. 743, 744; 9; Treaty with the 351, art. 4, 10 Stat.

. See also note 24

herokees); Act of 255, § 1, 25 Stat.

tory provisions have been repealed.²⁹ Other statutes³⁰ and regulations³¹ authorizing apportionment and distribution of tribal funds on deposit in the United States Treasury among individual members of the tribe remain in force, although such distributions now are made with tribal consent.

Some treaties, agreements, and statutes also provided that compensation for the cession of tribal lands be paid from proceeds of the sale of the lands.³² Federal law requires that proceeds of such sales be paid into the Treasury for the benefit of the tribe.³³ Any deduction from the proceeds for expenses in connection with the sale is prohibited under federal law, unless authorized in the treaty or agreement providing for disposition of the lands.³⁴

Another significant source of tribal funds in recent decades has been judgment awards from claims suits against the United States.³⁵ Generally, the disposition of such funds is governed expressly by statute.³⁶ These statutes and the administration of such judgment awards are discussed elsewhere in this chapter.³⁷

Since the late nineteenth century, nongovernmental sources of income have come to play an important role in the generation of tribal funds. Beginning with the building of railroads across Indian reservations,³⁸ tribal land and resources frequently have been sold³⁹ or leased⁴⁰ to private parties with governmental approval.

Federal law permits the sale of timber,⁴¹ the leasing of tribal land,⁴² and the granting of various mineral, oil, and gas mining rights.⁴³ Operation of the relevant statutes is discussed elsewhere.⁴⁴ The disposition of funds received from such leases or sales will be discussed briefly here. Many of these statutes expressly provide that the proceeds of sales or leases are to be deposited in the United States Treasury for the benefit of the tribe.⁴⁵ Even if such provisions

²⁹ E.g., Act of June 19, 1934, ch. 648, 48 Stat. 1021, 1033 (repealed 1955); Act of May 15, 1888, ch. 255, § 1, 25 Stat. 150 (repealed 1966).

³⁰ 25 U.S.C. §§ 111-121, 932, 781; Act of Apr. 30, 1948, ch. 244, 62 Stat. 206.

³¹ 25 C.F.R. pt. 102 (1980).

³² E.g., Act of Jan. 14, 1889, ch. 24, § 7, 25 Stat. 642, 645 (amended 1902) (Chippewas); Treaty with the Osages, Sept. 29, 1865, art. 2, 14 Stat. 687, 688.

³³ 25 U.S.C. § 152.

³⁴ Id. § 154.

³⁵ See generally Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D.L. Rev. 359 (1973); Note, *Toward a New System for the Resolution of Indian Resource Claims*, 47 N.Y.U. L. Rev. 1107, 1121-24 (1972); Sec. E *infra*.

³⁶ See 25 U.S.C. §§ 1300b to 1300b-5 (Kickapoos of Kansas and Oklahoma), 1300d to 1300d-9 (Mississippi Sioux), 1300e to 1300e-7 (Assiniboinés of Montana), 1401-1407 (Indian Claims Commission or Court of Claims judgments).

³⁷ Sec. E *infra*.

³⁸ See generally Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 ROCKY MTN. MIN. L. INST. 217 (1965).

³⁹ See, e.g., Act of Oct. 9, 1972, Pub. L. No. 92-472, §§ 1-6, 86 Stat. 788 (Coeur d'Alenes); Act of June 14, 1972, Pub. L. No. 92-312, 86 Stat. 216 (Southern Utes) (codified at 25 U.S.C. §§ 668-670); Act of Aug. 10, 1964, Pub. L. No. 88-413, 78 Stat. 387 (Eastern Shawnees).

⁴⁰ See generally P. MAXFIELD, M. DIETERICH & F. TRELEASE, *NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS* (Boulder: Rocky Mountain Mineral Law Foundation, 1977); Sec. C *supra*.

⁴¹ E.g., 25 U.S.C. §§ 407, 466. See Sec. C3 *supra*.

⁴² E.g., 25 U.S.C. § 415. See Sec. C1-2 *supra*.

⁴³ E.g., 25 U.S.C. §§ 396a-402. See Sec. C2 *supra*.

⁴⁴ See Sec. C1-3 *supra*.

⁴⁵ E.g., 25 U.S.C. §§ 398b, 399, 400a. Special acts applicable to particular tribes often contain similar provisions for depositing royalties, rents, or other revenues in the United States Treasury.

are absent from the statute, the Secretary of the Interior may require the proceeds to be so deposited in the exercise of his statutory approval power over such sales and leases.⁴⁶ Special statutes authorizing the sale or condemnation of Indian lands often have the same requirement.⁴⁷

In addition to the sources of tribal assets discussed above, the Indian Financing Act of 1974 has created a revolving Indian loan fund of public and certain other monies to further economic development by both Indian tribal organizations and individual Indian borrowers.⁴⁸ The Act provides for nonreimbursable business grants to Indian tribes to establish or expand reservation economic enterprises⁴⁹ and for loan guarantees and insurance of loans made by financial institutions or Indian tribes to further the economic development of tribal organizations.⁵⁰

A major source of tribal income has been federally appropriated funds for various programs that are paid directly to the tribal governing body or the organization operating the programs.⁵¹ Recently, federal revenue sharing funds also have become an important source of revenue for Indian tribes. Under the federal revenue sharing statute, Indian tribes and Alaska Native villages that have a recognized governing body performing substantial governmental functions are entitled to a per capita share of any revenue funds allocated to the county in which they are located.⁵² The importance of federal revenue sharing as a source of tribal funds is illustrated by the fact that between December 1972, when the revenue sharing legislation took effect, and September 1978 approximately fifty-six million dollars was distributed from the United States Treasury to Indian tribes and Alaska Native villages.⁵³

Federal law expressly authorizes the Secretary of the Interior to accept donations of funds or other property for the advancement of Indians and to use such property according to the terms of the donation in furtherance of any authorized program for the benefit of Indians.⁵⁴ Donated property does not become tribal property in the sense that the term is used here, although the Secretary may use it to further authorized tribal programs.

E.g., Act of Apr. 15, 1912, ch. 78, 37 Stat. 85 (homestead payments on Coeur d'Alene Reservation); Act of May 29, 1908, ch. 217, § 4, 35 Stat. 458, 459 (sale of Spokane surplus lands); Act of May 23, 1908, ch. 193, § 2, 35 Stat. 268, 271 (sale of Chippewa timber). *Cf.* Act of Feb. 18, 1909, ch. 147, 35 Stat. 636, 637 (Kiowas, Comanches, and Apaches) (payments to Secretary of the Interior to be held in trust for tribe).

⁴⁶ *E.g.*, 25 U.S.C. § 415. See also 25 C.F.R. § 131.5(f) (1980). This discretionary requirement is more likely to be imposed as a condition of secretarial approval if the tribe leasing the land is not chartered or incorporated under the Indian Reorganization Act. 25 U.S.C. §§ 476-478.

⁴⁷ *E.g.*, 16 U.S.C. §§ 810, 833m. See also 25 U.S.C. § 325; 25 C.F.R. § 161.14 (1980).

⁴⁸ 25 U.S.C. §§ 1461-1469.

⁴⁹ *Id.* §§ 1521-1524 (§ 1523 amended 1977).

⁵⁰ *Id.* §§ 1481-1498.

⁵¹ See, *e.g.*, *id.* §§ 450f-450h, 458d.

⁵² 31 U.S.C. § 1227(b)(4). See also 31 C.F.R. §§ 51.2(k), 51.43 (1980).

⁵³ U.S. DEPT OF TREASURY, OFFICE OF REVENUE SHARING, INDIAN TRIBES AND ALASKAN NATIVE VILLAGES ALLOCATIONS, ENTITLEMENT PERIOD 9, at 28 (Washington: Government Printing Office, 1977). The allocations for entitlement period 9, which ran from October 1, 1977 through September 1, 1978, show a further allocation of nearly 9.3 million dollars to Indian tribes and Alaska Native villages. *Id.*

⁵⁴ 25 U.S.C. § 451.

~~b. Trust Administration of Tribal Funds and Securities~~

The federal government manages substantial assets in cash and securities held by the United States for the benefit of designated Indian tribes as part of the trust administration of tribal resources. Not all tribal cash or securities, however, are administered by the federal government. The federal government administers only those funds that by treaty,⁵⁵ statute,⁵⁶ or contractual provision must be deposited in the United States Treasury. For example, federal statutes require that proceeds from the sale of ceded lands that were to be invested for or paid to Indian tribes under treaty or agreement be deposited in the Treasury.⁵⁷ Statutes also authorize the Secretary of the Interior to deposit in the Treasury all sums received from the redemption of Indian-owned securities and from the sale of trust lands.⁵⁸ The statutes authorizing leasing of Indian lands expressly require the proceeds from such leases to be deposited in the United States Treasury to the credit of the tribe involved.⁵⁹

Federal law requires Indian funds to be carried on the books of the Treasury as trust funds and to be disbursed "in compliance with the terms of the trust."⁶⁰ As discussed below, such tribal trust funds earn interest at rates governed by law. In practice, the United States Treasury holds these tribal funds collectively for the tribes, and the Secretary of the Interior and the Bureau of Indian Affairs have responsibility for maintaining the accounts of individual tribes.⁶¹

Funds and securities held for Indians are controlled by a number of federal statutes and regulations. Federal law authorizes the Secretary of the Interior to invest tribal trust funds in any "public obligations of the United States or in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."⁶² Since 1966 the Bureau of Indian Affairs has used this authority to operate a formal investment program designed to maximize the rate of return on Indian trust funds within constraints imposed by law.⁶³ As of September 30, 1977, the Bureau's investment program was administering over \$494 million in tribal trust

⁵⁵ *E.g.*, Treaty with the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas and Piankeshaws, Miamies, Ottawas of Blanchard's Fork and Roche de Boeuf, and others, Feb. 23, 1867, art. 6, 15 Stat. 513, 515; Treaty with the Sacs, Foxes, and Iowas, Mar. 6, 1861, art. 2, 12 Stat. 1171; Treaty with the Flatheads, Kootenays, and Upper Pend d'Oreilles, July 16, 1855, art. 4, 12 Stat. 975, 976; Treaty with the Sacs and Foxes, Oct. 11, 1842, 7 Stat. 596.

⁵⁶ See note 45 *supra*.

⁵⁷ *E.g.*, 25 U.S.C. § 152. See *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); 3 Op. Att'y Gen. 238 (1837) (Creek orphan fund).

⁵⁸ *E.g.*, 25 U.S.C. § 161. See 20 Op. Att'y Gen. 517 (1893) (modification of agreement with Crows); 17 Op. Att'y Gen. 104 (1881) (Indian trust funds).

⁵⁹ See note 45 *supra*.

⁶⁰ 31 U.S.C. § 725(a)(67). *Cf.* Act of June 25, 1936, ch. 814, 49 Stat. 1928 (amending Act of June 26, 1934, ch. 756, § 20, 48 Stat. 1224, 1233) (exempting certain funds held in trust for individual Indians or for Indian corporations).

⁶¹ See, *e.g.*, 25 U.S.C. § 145 (requiring an annual accounting by Secretary of Interior for unexpended appropriations of public monies intended for Indian tribes and accounting for reimbursement of accounts owing to federal government from tribal funds as result of advances).

⁶² 25 U.S.C. § 162a.

⁶³ BUREAU OF INDIAN AFFAIRS, BRANCH OF INVESTMENTS, INDIAN TRUST FUND INVESTMENTS: FISCAL YEAR 1977 ANNUAL REPORT [hereinafter cited as BRANCH OF INVESTMENTS 1977 REPORT]. See text at notes 89-93 *infra*.

funds.⁶⁴ The Bureau of Indian Affairs invests in lawfully authorized investments most of the tribal trust funds on deposit with the government, unless the tribe that owns the funds objects. To date no tribe has formally objected to investment. Almost all of the funds (98.7%) have been invested in time certificates of deposit insured by the federal government; the remainder of the funds is invested in government securities. Funds are invested on an individual tribal basis, usually for one year or less, rather than on a common or pooled basis.⁶⁵

Federal statutes authorize deposit of tribal trust funds held by the United States Treasury in approved banks.⁶⁶ Recent Bureau practice has been to transfer tribal trust funds from federal depository banks to the United States Treasury.

The term "tribal trust funds" includes several kinds of Indian funds managed by the federal government. Since 1883 federal legislation has provided that all miscellaneous revenues derived from Indian reservations, agencies, and schools that are not the result of the labor of individual tribal members must be paid into the Treasury and carried in separate accounts for the benefit of the respective tribes on whose behalf they were collected.⁶⁷ Although this legislation purports to cover "[a]ll miscellaneous revenues derived from Indian reservations, agencies and schools,"⁶⁸ the Department of the Interior and the Comptroller General have long taken the position that this language "has no application to such payments as may lawfully be made to tribal officers."⁶⁹ Their conclusion was supported by the legislative history of the 1883 statute and its 1926 amendment,⁷⁰ which indicates that the legislation was designed to govern only revenues received by officials and employees of the Interior Department and to control and standardize departmental accounting procedures.⁷¹ Thus, the legislation was not designed to control or prohibit payments made directly to tribal governments through tribal officers.⁷² Further, a number of tribal constitutions approved by the Secretary of the Interior under the

⁶⁴ See BRANCH OF INVESTMENTS 1977 REPORT, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ 25 U.S.C. § 162a; 25 C.F.R. pt. 105 (1980). Trust funds for mineral and certain other leases often are paid to the superintendent of the reservation or to other Bureau of Indian Affairs area officers. See, e.g., *id.* § 171.12 (1980). These officials are authorized to deposit such trust funds in depository banks that have been approved by the Commissioner of Indian Affairs and have posted approved surety or other securities to cover Indian deposits. 25 U.S.C. § 162a; 25 C.F.R. pt. 105 (1980).

⁶⁷ Appropriations Act of Mar. 3, 1883, ch. 141, § 1, 22 Stat. 582, 590 (codified at 25 U.S.C. § 155). These miscellaneous revenues were originally carried on Treasury accounts under the peculiar caption "Indian Moneys, Proceeds of Labor." The caption may have resulted from an error in the Secretary's interpretation of the original enactment, which created a fund to receive revenue from Indian reservations and facilities that was "not the result of the labor of any member of such tribe." *Id.* (emphasis added).

Since 1887 miscellaneous funds attributable to particular tribes are required by statute to be carried in separate accounts for the respective tribes and treated as tribal funds. Appropriations Act of Mar. 2, 1887, ch. 320, 24 Stat. 449, 463 (codified at 25 U.S.C. § 161b).

⁶⁸ 25 U.S.C. § 155.

⁶⁹ Op. Comp. Gen., June 30, 1937 (A-86599). This Opinion is only addressed to tribes organized under the Indian Reorganization Act. 25 U.S.C. § 476. Whether the opinion applies equally to an unorganized tribe as a result of inherent tribal sovereignty remains uncertain.

⁷⁰ Act of May 17, 1926, ch. 309, § 1, 44 Stat. 560.

⁷¹ See Op. Comp. Gen., June 30, 1937 (A-86599).

⁷² *Id.*

Indian Reorganization Act expressly envision the collection of revenue directly by the tribal governing body.⁷³

By contrast, federal statutes require that revenue collections from assessments upon users of Indian irrigation water projects be paid into a special trust fund created to cover the expenses of such projects.⁷⁴ Thus funds derived from Indian irrigation projects are not held as tribal trust funds.

Tribal governments are free to invest, deposit, and spend funds lawfully received by tribal officers in any manner consistent with their tribal constitutions. Funds received directly by tribal governments include revenue sharing funds,⁷⁵ proceeds from rentals of tribal lands to tribal members,⁷⁶ grazing fees,⁷⁷ and federal funds appropriated for tribal programs.

(1) Interest on Tribal Trust Funds

Interest rates paid on tribal funds held by the United States Treasury for the benefit of a tribe generally are governed by law. The terms of a treaty⁷⁸ or an act of Congress⁷⁹ creating specific tribal trust funds may set the rate of interest to be paid on such funds. In the absence of a specific provision, other federal law often specifies the rate of interest to be paid.⁸⁰ In general, all tribal funds

⁷³ *E.g.*, SAC AND FOX OF THE MISSISSIPPI IN IOWA CONST. art. 10, § 1(j) (1937); HUALPAI CONST. art. 6, § 1(m) (1956).

Pursuant to the express statutory authorization of the Indian Reorganization Act, 25 U.S.C. § 477, tribal corporate charters issued under the Act also authorize the tribes to receive and dispose of personal property, including cash. *E.g.*, ROSEBUD SIOUX CORPORATE CHARTER art. 5 (1937). Thus, both the language of section 477 and the administrative actions taken under the Indian Reorganization Act in approving tribal constitutions and charters reflect a consistent recognition of the tribal right to receive and expend tribal funds free from any federal trust limitations imposed by 25 U.S.C. § 155. It is likely that these actions recognized an inherent tribal power rather than resulting from a delegation of power to tribes organized under the Indian Reorganization Act, since Congress acknowledged the right of tribal officers to receive funds long before it passed the IRA. *E.g.*, Act of Feb. 28, 1901, ch. 622, 31 Stat. 819 (Seneca lease rentals).

⁷⁴ 31 U.S.C. §§ 725a-1 to 725a-3. Different treatment of Indian irrigation project revenues can be attributed in part to the fact that such projects generally are built with public funds expended under the Snyder Act, 25 U.S.C. § 13, rather than with tribal monies. Although the income from tribal projects constructed with federal funds generally belongs to the tribe, see 25 C.F.R. § 131.13 (1980), Congress has chosen to retain Indian irrigation projects revenue to be used for the expenses and maintenance of such projects, for creation of reserves for emergency project expenses, and to amortize the costs of construction.

⁷⁵ See text at notes 52-53 *supra*.

⁷⁶ 25 C.F.R. pt. 131 (1980).

⁷⁷ *Id.* § 151.18.

⁷⁸ *E.g.*, Treaty with the Sacs and Foxes and Iowas, Mar. 6, 1861, art. 2, 12 Stat. 1171; Treaty with the Creeks and Seminoles, Aug. 7, 1856, arts. 6, 8, 11 Stat. 699, 701; Treaty with the Ottawas and Chippewas, July 31, 1855, art. 2, 11 Stat. 621, 623. See *United States v. Blackfeather*, 155 U.S. 180, 192 (1894).

⁷⁹ *E.g.*, Act of Mar. 3, 1893, ch. 209, § 12, 27 Stat. 612, 644; Act of Jan. 14, 1889, ch. 24, § 7, 25 Stat. 642, 645; Act of June 27, 1846, ch. 34, §§ 2, 3, 9 Stat. 20, 35. See 25 U.S.C. § 161.

⁸⁰ The Secretary of the Interior is authorized by law to invest proceeds received under treaty provisions from lands ceded by Indian tribes at a rate of at least five percent per annum. 25 U.S.C. § 158. No such funds are presently held.

Regulations also envision the payment of interest on tribal funds deposited in approved depository banks at a rate contractually agreed upon by the Commissioner of Indian Affairs and the bank. 25 C.F.R. pt. 105 (1980). Insofar as these regulations appear to require payment of interest on demand deposits, they are inconsistent with section 324(c) of the Banking Act of 1935, 12 U.S.C. § 371a, and with the Federal Reserve regulations issued under the Act, 12 C.F.R. § 217.2 (1980), which prohibit payment of interest on such deposits.

held by the Treasury in accounts with balances in excess of five hundred dollars earn simple interest at the rate of four percent per annum if the interest rate is not otherwise specified by law.⁸¹ The Treasury does not, however, pay interest on the accrued interest in tribal trust accounts.⁸²

Courts have held that the return on tribal investments may not fall below the statutory four percent interest rate paid by the Treasury on accounts on which the interest rate is not otherwise specified.⁸³ More importantly, it has been held that the government has a duty to maximize return on its investment of tribal funds as part of the federal trust responsibility in administering tribal property.⁸⁴ The government is liable for amounts lost through failure to invest tribal funds if the return from authorized investment would have exceeded the interest paid by the Treasury.⁸⁵

Failure to maximize return on investment can occur in a number of ways. An example is expenditures paid out of an interest-bearing account bearing a higher rate of interest although tribal funds deposited at a lower rate of interest were legally available.⁸⁶ Failure to deposit funds in the highest interest-bearing Treasury account in which they legally may be deposited also violates the federal government's fiduciary responsibilities.⁸⁷ No breach of fiduciary obligation is involved if tribal funds are deposited in an account earning a lower rate of interest than other Treasury accounts, so long as the account yields the highest interest available by law for such funds.⁸⁸

Since 1938 the Secretary of the Interior has been authorized under 25 U.S.C. § 162a to invest tribal trust funds "for the best interest of the Indians" in "any

Thus the Interior Department deposits tribal funds that must be deposited in demand accounts in banks that do not pay interest on such accounts. See Op. Sol. Int., May 27, 1936 (M 28519), reprinted in 1 INTERIOR OPINIONS, *supra* note 5, at 645; Op. Sol. Int., Mar. 12, 1936 (M 28231), reprinted in 1 INTERIOR OPINIONS, *supra* note 5, at 604. The current statute authorizing withdrawal of tribal trust funds from the United States Treasury in favor of deposits in approved banks expressly authorizes the Secretary of the Interior to waive payment of interest on any deposit payable on demand. 25 U.S.C. § 162a.

Present Bureau practice does not involve the use of depository banks as a long-term repository for tribal funds. Rather, depository banks serve as short-term transfer agents funneling tribal funds to the Treasury or the Bureau's investment program. See generally BRANCH OF INVESTMENTS 1977 REPORT, *supra* note 63.

⁸¹ 25 U.S.C. § 161a. Tribal funds initially credited to the "Indian Moneys, Proceeds of Labor" fund and since transferred to separate tribal accounts as required by law bear simple interest at the four percent rate if the account balance exceeds \$500. *Id.* § 161b. Treasury proceeds of oil and gas leases on executive order reservation lands also earn four percent interest. *Id.* § 398b.

⁸² See *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1393 (Ct. Cl. 1975); *Menominee Tribe v. United States*, 97 Ct. Cl. 158, 162-65 (1942). The Treasury also does not pay interest on the non-segregated funds held in the "Indian Moneys, Proceeds of Labor" account.

⁸³ *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973). This holding applies only to the investment of tribal funds that could have been deposited in the Treasury at a four percent interest rate under 25 U.S.C. § 161a or a similar statute. If funds could have been deposited under treaty or statute in Treasury accounts that earn rates of interest higher than four percent, failure to deposit such funds may also violate federal fiduciary obligations in handling tribal trust funds. *E.g.*, *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945).

⁸⁴ *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975) (containing an historical survey of federal interest policies).

⁸⁵ *Id.*

⁸⁶ See, *e.g.*, *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944).

⁸⁷ See, *e.g.*, *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945).

⁸⁸ *Cf. Menominee Tribe v. United States*, 67 F. Supp. 972, 975-76 (Ct. Cl. 1946) (log fund credited with more interest than allowed by law).

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public-debt obligations of the United States or in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States." Failure to invest tribal trust funds when the market forces result in yields on such investments in excess of the four or five percent simple interest paid by the Treasury on trust fund accounts also constitutes a failure to maximize return as required by the government's role as trustee.⁸⁹ Of course, the government's duty to maximize return on tribal trust funds requires only that it make maximum use of investment and deposit opportunities authorized by law. Thus, the government is not liable for failure to pay interest on revenues required by law to be deposited in non-interest-bearing accounts.⁹⁰

The low rate of return on Treasury deposits in a period of rising interest rates was the major factor that prompted the Bureau to adopt its investment program in 1966 under the authority granted to the Secretary in 25 U.S.C. § 162a.⁹¹ Although the types of authorized investments are limited to public-debt obligations of the United States or to other bonds, notes, or obligations guaranteed by the federal government,⁹² in recent years the rate of return from the interest program has been comparable, and in some cases superior, to private funds not faced with such legal restrictions. For the fiscal year ending September 30, 1977, the Bureau claimed a 6.43% rate of return on the tribal trust funds which it invested,⁹³ improving substantially upon the statutory rate paid by the Treasury. Additionally, since most of these funds are invested in time certificates of deposit that pay compound interest, the investment program allows interest to be earned on the accrued interest from tribal trust funds administered by the federal government.

⁸⁹ *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

⁹⁰ *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

⁹¹ See note 63 *supra*.

⁹² 25 U.S.C. § 162a. Certain other statutes authorize investment of any federally managed trust fund in: (1) bonds or other obligations issued by the Tennessee Valley Authority, 16 U.S.C. § 831n-4(d); (2) obligations issued by Federal Home Loan Banks, 12 U.S.C. § 1435; (3) obligations issued by the Government National Mortgage Association and Federal National Mortgage Association, *id.* § 1723c; and (4) certain obligations of the Commodity Credit Corporation, 15 U.S.C. § 713a-4. In *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), the court affirmed that the obligations are authorized investments for Indian trust funds, although the first three are not insured by the United States for principal or interest. The court relied for its opinion on an unpublished opinion of the Associate Solicitor for Indian Affairs and the fact that the statute in question modified the limitations contained in 25 U.S.C. § 162a. *Cf.* 12 U.S.C. § 1730b (authorizing investment of trust funds under control of United States in savings and loan associations insured by the Federal Savings and Loan Insurance Corporation). A compilation of securities of the United States that constitute authorized investments is contained in *Op. Ass't Sol. Int.*, May 3, 1968, and is reprinted in part in *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1395 n.10 (Ct. Cl. 1975). Because most federal insurance programs for commercial banks, such as the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1832; 12 C.F.R. pt. 329 (1980), limit the extent of federal insurance to a maximum amount, questions may be raised if tribal trust funds are invested in bank obligations in excess of the insurance limit without securing adequate collateral.

⁹³ BRANCH OF INVESTMENTS 1977 REPORT, *supra* note 63, at 21.

(2) Creditors' Claims

Present treatment of third party creditor claims to tribal trust funds differs markedly from treatment of such claims historically.⁹⁴ By law, disbursements of tribal trust funds must be authorized by appropriation of Congress.⁹⁵ The annual appropriations bills contain no general provisions authorizing payment of tribal creditors with such funds. Absent specific prohibition by law, tribes can authorize payment of creditors' claims out of their trust funds. A number of statutes, however, expressly prohibit use of specified trust funds for payment of tribal debts, apparently even with the consent of the affected tribe.⁹⁶

Tribal creditors appear to have no legal right to compel payment of their claims out of tribal trust funds. Moreover, the lack of jurisdiction of the Court of Claims over such cases⁹⁷ and the immunity of the Secretary of the Treasury from suit to compel payment of trust monies to tribal creditors protect tribal trust funds held by the United States from levy for satisfaction of creditors' claims. As a general rule, tribal trust funds held by the United States are not subject to claims of third parties unless payment of such claims is clearly

⁹⁴ During the nineteenth century treaties often expressly provided for payment of certain debts owed by the tribe to traders or other persons from trust annuities funds due the tribe. *E.g.*, Treaty with the Kansas, Oct. 5, 1859, art. 5, 12 Stat. 1111, 1112; Treaty with the Sacs and Foxes, Oct. 1, 1859, art. 5, 15 Stat. 467, 469; Treaty with the Chippewas, Oct. 4, 1842, art. 4, 7 Stat. 591, 592. By contrast, certain treaties expressly prohibited payment by the United States of tribal debts out of annuity funds, possibly as a result of earlier unsatisfactory tribal experiences resulting from treaty provisions authorizing such payments. *E.g.*, Treaty with the Sacs and Foxes, Feb. 18, 1867, art. 8, 15 Stat. 495, 497; Treaty with the Shawnees, May 10, 1854, art. 10, 10 Stat. 1053, 1057. *Cf.* Treaty with the Nez Percés, June 11, 1855, art. 7, 12 Stat. 957, 960 (debts of tribal member may not be paid out of annuities).

Whether funds owed to or held in trust for a tribe by the United States were subject to claims of creditors was also addressed in a number of special statutes. *E.g.*, Act of May 16, 1874, ch. 181, § 1, 18 Stat. 47 (Sioux). In a few instances general payment was authorized to all creditors of a specified tribe. *See, e.g., id.* Usually, however, the statutes authorizing payments of designated claims required tribal agreement, *e.g.*, Act of May 27, 1902, ch. 887, 32 Stat. 207; Act of Apr. 4, 1888, ch. 59, 25 Stat. 79; Act of Aug. 5, 1882, ch. 406, 22 Stat. 728, or dealt with depredations. *E.g.*, Act of Mar. 3, 1885, ch. 360, 23 Stat. 478, 498; Act of Mar. 3, 1883, ch. 113, 22 Stat. 804. Federal law also provided that certain depredation claims could be litigated in the Court of Claims as suits against the United States, with leave granted to interested Indians to appear as parties defendant. Judgments rendered against an Indian tribe were satisfied out of treaty annuities, other funds, or any appropriations for the benefit of the tribe. Act of Mar. 3, 1891, ch. 538, 26 Stat. 851.

The United States Code still contains statutes dealing with depredations. 25 U.S.C. §§ 229, 230. *See French v. United States*, 49 Ct. Cl. 337 (1914); *Lowe v. United States*, 37 Ct. Cl. 413 (1902); *Garrison v. United States*, 30 Ct. Cl. 272 (1895); *Johnson v. United States*, 29 Ct. Cl. 1 (1893), *aff'd*, 160 U.S. 546 (1896). These cases suggest that section 229 not only provides a reporting mechanism for depredations but creates a liability against the United States. Depredations claims were not generally cognizable in the Court of Claims until passage of the Act of Mar. 3, 1891, ch. 538, 26 Stat. 851.

⁹⁵ 25 U.S.C. §§ 122, 123.

⁹⁶ *E.g.*, Act of June 29, 1960, Pub. L. No. 86-543, 74 Stat. 254; Act of June 29, 1960, Pub. L. No. 86-539, 74 Stat. 252. If the intended use of certain tribal trust funds is specified by law, the funds clearly are rendered immune from third-party claims. *See* Act of Aug. 11, 1964, Pub. L. No. 88-418, 78 Stat. 389 (proceeds of sale of Cheyenne River Sioux land held for purchase of real property).

⁹⁷ *Cf. Campbell v. United States*, 116 F. Supp. 599 (Ct. Cl. 1953) (wardship provides no grounds for converting claim against individual Indian into claim against United States). *Contra*, Act of Mar. 3, 1891, ch. 538, 26 Stat. 851 (vesting jurisdiction in Court of Claims for depredation claims arising prior to passage of the Act).

authorized by statute⁹⁸ or by lawful action of the tribe.⁹⁹ However, a decision of the Secretary disallowing payment for services under a contract with a tribe because of the claimant's alleged contractual violations has been held to be reviewable under the Administrative Procedure Act.¹⁰⁰

c. Tribal Right to Expend Funds

Because the United States and the Indian tribes each have an interest in tribal trust funds, the normal method of disposing of such funds has been by mutual consent of the tribe and the federal government. Treaty provisions regarding these funds regularly embodied a common agreement concerning the disposition of tribal money. Agreements with Indian tribes have had similar provisions. Certain statutes provided for the expenditure of tribal funds for objects approved by the tribal council concerned.¹⁰¹ Perhaps the earliest of such provisions is found in section 3 of the Appropriations Act of February 17, 1879, providing for the diversion of various appropriations to alternative uses for the benefit of the tribe "within the discretion of the President, and with the consent of said tribes, expressed in the usual manner."¹⁰² The language of this provision was repeated in subsequent appropriations acts¹⁰³ and made permanent by the Act of March 1, 1907.¹⁰⁴

Many statutes have authorized the expenditure of tribal funds without express reference to the wishes of the tribe.¹⁰⁵ The omission of express reference to tribal consent in tribal fund appropriation provisions does not necessarily imply the absence of consent. Provisions for the appropriation of tribal funds usually are sought at the request of the tribe concerned, although no reference to this fact appears in the text of the statute.

Present law dealing with the power of an Indian tribe to expend funds or dispose of other personal property held by the United States in trust for the

⁹⁸ E.g., Act of Oct. 14, 1966, Pub. L. No. 89-660, § 2, 80 Stat. 910, 911 (codified at 25 U.S.C. § 1132) (distribution of judgment funds after deducting attorneys' fees and litigation expenses); Act of July 14, 1960, Pub. L. No. 86-651, 74 Stat. 509, 512 (payment of attorneys' expenses). See also Act of Nov. 2, 1966, Pub. L. No. 89-717, 80 Stat. 1114 (codified at 25 U.S.C. 967a-967d); Act of Oct. 14, 1966, Pub. L. No. 89-661, 80 Stat. 911 (codified at 25 U.S.C. § 876).

⁹⁹ E.g., Act of Apr. 19, 1950, ch. 92, § 7, 64 Stat. 44, 46 (codified at 25 U.S.C. § 637); Act of June 7, 1944, ch. 237, 58 Stat. 271. See Sec. E *infra*.

¹⁰⁰ *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), *on remand*, 369 F. Supp. 411 (D. Md. 1974), *aff'd*, 519 F.2d 1399 (4th Cir. 1975).

¹⁰¹ E.g., Act of Apr. 19, 1950, ch. 92, § 7, 64 Stat. 44, 46 (codified at 25 U.S.C. § 637); Act of June 7, 1944, ch. 237, 58 Stat. 271; J. Res. 115, June 20, 1936, ch. 649, § 2, 49 Stat. 1568; Act of Mar. 2, 1889, ch. 421, § 3, 25 Stat. 1012, 1013.

¹⁰² Ch. 87, § 3, 20 Stat. 295, 315.

¹⁰³ E.g., Appropriations Act of May 11, 1880, ch. 85, § 5, 21 Stat. 114, 133.

¹⁰⁴ Ch. 2285, 34 Stat. 1015, 1016 (codified at 25 U.S.C. § 140).

¹⁰⁵ E.g., Act of June 28, 1906, ch. 3578, 34 Stat. 547; Act of Mar. 3, 1873, ch. 324, 17 Stat. 627. Expenditure of tribal trust funds for a wide variety of purposes considered by Congress to be beneficial to the tribe was authorized in a number of statutes. E.g., Act of Jan. 12, 1877, ch. 19, 19 Stat. 221. Often federal appropriations for improvements on tribal lands, including bridges, roads, and schools, were taken directly out of tribal trust funds or made reimbursable from tribal funds. E.g., Act of Feb. 26, 1925, ch. 343, 43 Stat. 994; Act of Aug. 21, 1916, ch. 366, 39 Stat. 521; Act of July 8, 1916, ch. 230, 39 Stat. 353. Other statutes authorized loans or direct payments to individual members of the tribe. E.g., Act of June 3, 1924, ch. 239, 43 Stat. 357; Act of June 4, 1920, ch. 224, § 11, 41 Stat. 751, 755; Act of Apr. 29, 1902, ch. 642, 32 Stat. 177. *Cf. J. Res. 9*, Feb. 11, 1890, 26 Stat. 669 (loan to Chippewas until legislation authorizing timber sale passed).

tribe requires authorization by act of Congress.¹⁰⁶ Thus 25 U.S.C. § 123 provides:

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

In addition to the three categories of expenditures specified in section 123 for which specific appropriations are not required, 25 U.S.C. § 123a provides that the trust funds of any tribe may be used to pay insurance premiums for the protection of tribal property and for liability insurance.¹⁰⁷ Other sections of the code extend the requirement of express appropriation for expenditure of funds to the Five Civilized Tribes¹⁰⁸ and to the Quapaws and other tribes of the Quapaw Agency in Oklahoma.¹⁰⁹

The history of Indian appropriation legislation shows a continuous struggle between two principles. On the one hand, it is argued that continuity, prudent foresight regarding the expenditure of funds, ease and economy of administration of trust funds, and the nature of the government's trust obligation to Indians require that trust funds be available to the tribes with reasonable promptness absent the delays of appropriations. On the other hand, it has been argued that Congress must retain its full constitutional control over appropriations.¹¹⁰ This position does not take into account the fact that tribal trust funds and investments held by the United States are trust funds belonging to the tribes, not public money collected as revenue by the government. As such tribal funds should be exempt from the constitutional appropriations requirement.¹¹¹

A compromise between these two principles is reflected in the language of the annual Interior Department appropriations acts which in recent years have made general appropriations from tribal trust funds for a long list of diverse purposes.¹¹² Prior to a 1950 proviso added to the Interior Department appro-

¹⁰⁶ See generally *Sioux Tribe v. United States*, 78 F. Supp. 793 (Ct. Cl. 1948), *cert. denied*, 337 U.S. 908 (1949); *Choctaw Nation v. United States*, 91 Ct. Cl. 320 (1940), *cert. denied*, 312 U.S. 695 (1941); *Leighton v. United States*, 29 Ct. Cl. 288 (1894), *aff'd*, 161 U.S. 291 (1896).

¹⁰⁷ See also 25 U.S.C. § 123b ("Tribal trust funds shall be available for appropriation by Congress for traveling and other expenses . . . of tribal organizations, when engaged on business of the tribes").

¹⁰⁸ *Id.* § 124.

¹⁰⁹ *Id.* § 125.

¹¹⁰ U.S. CONST. art. I, § 9, cl. 7.

¹¹¹ Cf. *Emery v. United States*, 186 F.2d 900 (9th Cir.), *cert. denied*, 341 U.S. 925 (1951) (money in constructive trust for benefit of tenants not public funds and thus not subject to constitutional appropriations provision); *Varney v. Warehime*, 147 F.2d 238 (6th Cir.), *cert. denied*, 325 U.S. 882 (1945) (trust funds retained and disbursed by federal agent without deposit into United States Treasury not public funds and thus not subject to constitutional appropriations provisions).

¹¹² The language of the statutes is exemplified by the following:

In addition to the tribal funds authorized to be expended by existing law, there is hereby appropriated not to exceed \$3,000,000 from tribal funds not otherwise available for expenditure for the benefit of Indians and Indian tribes, including pay and travel expenses of employees; care, tuition, and other assistance to Indian children attending public and private schools (which may be paid in advance or from date of admission); purchase of land and improvements on land, title to which shall be taken in the name of the United States in trust for the tribe for which

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appropriations acts allowing for advances of tribal funds for purposes designated by the tribal governing body with approval of the Secretary,¹¹³ an Indian tribe seeking its tribal trust funds had to request a specific appropriation unless the contemplated expenditure was covered by the authority of the Secretary. During the 1940's Congress began to alter these restrictions by enacting statutes for specific tribes authorizing disbursement of tribal trust funds for any purpose designated by the tribal governing body and approved by the Secretary of the Interior.¹¹⁴ This policy was made applicable to all tribes by the last proviso to the trust funds section of the Interior Department appropriations acts. Consequently, administrative approval is sufficient for the disbursement of tribal funds rather than specific congressional appropriation.

The limitations upon the power of an Indian tribe to dispose of funds or other personal property in which it has an equitable interest do not extend to funds or personal property over which the tribe has full legal ownership. This is true even if such funds or property are voluntarily deposited for safekeeping with a local superintendent and, therefore, under the Permanent Appropriation Repeal Act of 1934,¹¹⁵ are technically held in the Treasury of the United States. The Act of June 25, 1936, specifically exempts such deposits from the Permanent Appropriation Repeal Act for tribes chartered under the Indian Reorganization Act.¹¹⁶

Charters issued to tribes incorporated under the Indian Reorganization Act generally recognize that funds held in the tribal treasury are subject to disposition by the tribal corporation and are not subject to congressional appropriation. Section 17 of the Act authorizes a chartered tribe to "dispose of property . . . real and personal."¹¹⁷ The various statutes governing investment, management, or appropriations of "tribal funds" and "trust funds" thus use the words as terms of art to refer to a well understood category of funds held in the Treasury of the United States or invested by the Bureau of Indian Affairs to the credit of the tribe pursuant to law or treaty. They do not apply to funds in the possession of the tribe itself. This view is in accord with the historical fact that Congress has never presumed to interfere with the expenditure of funds

purchased; lease of lands and water rights; compensation and expenses of attorneys and other persons employed by Indian tribes under approved contracts; pay, travel, and other expenses of tribal officers, councils, and committees thereof, or other tribal organizations, including mileage for use of privately owned automobiles and per diem in lieu of subsistence at rates established administratively but not to exceed those applicable to civilian employees of the Government; relief of Indians, without regard to section 7 of the Act of May 27, 1930 (46 Stat. 391) including cash grants: *Provided*, That in addition to the amount appropriated herein, tribal funds may be advanced to Indian tribes during the current fiscal year for such purposes as may be designated by the governing body of the particular tribe involved and approved by the Secretary.

Act of July 26, 1977, Pub. L. No. 95-74, 91 Stat. 285, 294. *Accord*, Act of July 31, 1976, Pub. L. No. 94-373, 90 Stat. 1043, 1051; Act of Dec. 23, 1975, Pub. L. No. 94-165, 89 Stat. 977, 986; Act of Sept. 6, 1950, ch. 896, 64 Stat. 595, 684. Statutes authorizing tribes to engage in certain of the transactions covered by the general appropriations provisions are found at various points in the code. *E.g.*, 25 U.S.C. §§ 81a-82a (attorneys' fees), 123b (tribal government travel and other expenses), 465 (purchase of restricted land, and other interests in real estate including water rights).

¹¹³ Appropriations Act of Sept. 6, 1950, ch. 896, 64 Stat. 595, 685.

¹¹⁴ Act of Apr. 19, 1950, ch. 92, § 7, 64 Stat. 44, 46 (codified at 25 U.S.C. § 637); Act of June 7, 1944, ch. 237, 58 Stat. 271.

¹¹⁵ Ch. 756, §§ 19-20, 48 Stat. 1224, 1232 (codified as amended at 31 U.S.C. §§ 725r-725s).

¹¹⁶ Ch. 814, 49 Stat. 1928.

¹¹⁷ 25 U.S.C. § 477.

held in tribal treasuries, even if collection of such funds by tribal authorities was regulated by specific legislation requiring reports to Congress by the tribal treasurer.¹¹⁸

The power of an Indian tribe to dispose of tribal real property is more limited than its power over personal property. A tribe may not validly alienate realty absent the consent of Congress or an official expressly authorized by Congress to approve particular forms of alienation. Tribes have complete power, however, to dispose of tribal personal property unless the property has been removed from their control and is in the possession of the federal government pursuant to some law or treaty.

Among the limitations voluntarily assumed by Indian tribes with respect to the disposition of tribal monies and other personalty are: (1) limitations contained in tribal constitutions;¹¹⁹ (2) limitations contained in tribal charters;¹²⁰ (3) limitations contained in tribal loan agreements;¹²¹ (4) limitations contained in tribal trust agreements;¹²² and (5) statutory limitations on funds received directly from the federal government.¹²³

E. Tribal Claims

A final aspect of tribal property rights consists of intangible property interests arising from tribal monetary claims against the federal government. Property rights that provide the basis for such claims have been discussed elsewhere in this chapter.¹

1. Methods of Resolving Tribal Claims

A variety of methods for resolving tribal monetary claims has been employed. Congress has chosen at times to resolve claims by legislative fiat, enacting special legislation to resolve disputes involving individual tribes or tribes located within a specific geographic area. For example, on December 18, 1971, Congress passed the Alaska Native Claims Settlement Act extinguishing all claims based on aboriginal title in Alaska while providing for \$962.5 million and 40 million acres of land as compensation for those claims.² Similarly, Congress enacted legislation in 1978 to resolve Indian claims to

¹¹⁸ *E.g.*, Act of May 18, 1916, ch. 125, § 27, 39 Stat. 123, 158 (repealed 1928); Act of Mar. 3, 1911, ch. 210, § 27, 36 Stat. 1058, 1077 (repealed 1954). *Cf.* Act of Feb. 28, 1901, ch. 622, 31 Stat. 819 (regulation of collection and disbursement of lease monies).

¹¹⁹ HUALPAI CONST. art. 6, § 1 (1956). See 25 U.S.C. § 476.

¹²⁰ *E.g.*, CONFEDERATED SALISH AND KOOTENAI OF THE FLATHEAD RESERVATION CORPORATE CHARTER § 5 (1936). See 25 U.S.C. § 477.

¹²¹ *E.g.*, 25 U.S.C. §§ 1461-1469, 1481-1498.

¹²² During the Depression various federally funded rehabilitation programs were administered by the tribes under trust agreements executed by the Commissioner of Indian Affairs. See Emergency Relief Appropriation Act of 1939, ch. 252, § 5(a), 53 Stat. 927, 930. These efforts were the prototypes of similar contractual arrangements for the tribal administration of federal Indian programs envisioned by the Indian Self-Determination Act. 25 U.S.C. §§ 450-450n.

¹²³ *E.g.*, Act of Sept. 29, 1977, Pub. L. No. 95-113, § 1301, 91 Stat. 913, 958 (codified at 7 U.S.C. §§ 2011-2027) (food stamps and food distribution); Act of May 23, 1977, Pub. L. No. 95-31, §§ 101-106, 91 Stat. 169 (not codified but set out in full at 42 U.S.C.A. § 5184 note) (emergency drought relief); Act of Oct. 20, 1972, Pub. L. No. 92-512, § 103, 86 Stat. 919 (repealed 1976) (original limitation on expenditure of revenue sharing funds to priority expenditures).

¹ *Secs. A, D supra.*

² Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1628). See Ch. 14, Sec. A *infra*.

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lands in Rhode Island by appropriating federal funds to purchase lands for the Indian claimants.³

The executive branch also has become involved in the resolution of tribal claims. Under the Pueblo Lands Act of 1924, a land board consisting of the Secretary of the Interior, the Attorney General, and a third member appointed by the President had authority to determine contested land claims in New Mexico and to compensate tribes for any land lost.⁴

Before establishment of the Indian Claims Commission in 1946,⁵ tribes had no forum for pursuing treaty-based claims against the federal government absent congressional action authorizing litigation on behalf of individual tribes. The Court of Claims was expressly prohibited by law from entertaining suits based on treaties⁶ and the doctrine of sovereign immunity effectively barred many other tribal claims against the federal government.⁷ Thus it was necessary for Congress to pass special acts granting the Court of Claims jurisdiction to adjudicate specified tribal claims.⁸ Between 1836 and 1946 Congress enacted 142 such acts.⁹ Access to the court usually was limited to a particular tribe or band; frequently the basis for the suit itself was specified, and thus limited, by the act.¹⁰ For example, in *Northwestern Band of Shoshone Indians v. United States*,¹¹ the special jurisdictional act authorizing land claims litigation by the tribe limited the suit to claims arising out of the Box Elder Treaty. Accordingly, the Court refused to consider whether the tribe might have a right to the land which was taken under the treaty based on original Indian title. Since the jurisdictional acts authorizing claims litigation constitute an exception to the sovereign immunity of the federal government from suit, the acts are read narrowly to exclude claims not specifically authorized.¹² The acts usually include a waiver of the statute of limitations which would otherwise be a bar to most tribal claims.

³ Act of Sept. 30, 1978, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C.A. §§ 1701-1712). See Ch. 2, Sec. F2d *supra*.

⁴ Ch. 331, 43 Stat. 636. See Ch. 2, Sec. B1e *supra*.

⁵ Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70 to 70v-3).

⁶ Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767.

⁷ *E.g.*, *Scholder v. United States*, 428 F.2d 1123 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970). See Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 52-53 (1979).

⁸ *E.g.*, of June 28, 1938, ch. 776, 52 Stat. 1209; Act of June 22, 1910, ch. 313, 36 Stat. 580; Act of Mar. 1, 1907, ch. 2290, 34 Stat. 1055; Act of Feb. 25, 1889, ch. 238, 25 Stat. 694. See generally Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L.J. 511 (1966); Ch. 6, Sec. A4a *supra*.

⁹ See *Creation of Indian Claims Comm'n: Hearings Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 163-66 (1945) (tables on tribal claims).

¹⁰ *E.g.*, Act of Aug. 26, 1935, ch. 686, 49 Stat. 801 (claims arising from treaty); Act of Feb. 11, 1920, ch. 68, 41 Stat. 404 (determination of amount due or claimed); Act of Mar. 3, 1919, ch. 103, 40 Stat. 1316 (claims arising from treaty); Act of Feb. 25, 1889, ch. 238, 25 Stat. 694 (claims arising from treaty).

¹¹ 324 U.S. 335 (1945), *aff'g* 95 Ct. Cl. 642 (1942).

¹² See, *e.g.*, *Scholder v. United States*, 428 F.2d 1123 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244 (1935); *Blackfeather v. United States*, 190 U.S. 368 (1903).

Dissatisfaction with case by case grants of jurisdiction was expressed as early as 1928 in the Meriam Report.¹³ In 1946 Congress addressed the problem by enacting more comprehensive legislation for the adjudication of tribal claims against the federal government. The Indian Claims Commission Act created a unique forum for hearing and deciding such claims.¹⁴

Suits authorized under the Act included all those claims over which the Court of Claims then had jurisdiction for non-Indian claimants, as well as those cases in law or equity arising under the Constitution, laws, treaties of the United States, or executive orders of the President. In addition, the Commission was granted jurisdiction over claims that would result "if the treaties, contracts or agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity," claims arising from the government's taking of tribal land without payment of the compensation to which the parties agreed, and claims "not recognized by any existing rule of law or equity" based on general principles of fair and honorable dealings.¹⁵ All claims accruing before August 13, 1946, were included within the jurisdiction of the Commission.¹⁶ Claimants under the Act were exempted from the defenses of statute of limitations and laches although other defenses could be raised by the government.¹⁷ The tribes were given until August 13, 1951 to file claims with the Commission.¹⁸

The Indian Claims Commission initially was granted a life of ten years, during which it was to hear and decide all cases filed prior to August 13, 1951.¹⁹ This grant of authority was extended several times to allow the Commission adequate time to meet the needs of its tremendous caseload.²⁰ The Commission's authority finally terminated on September 30, 1978, at which time its unfinished work was transferred to the Court of Claims for completion.²¹

The dissolution of the Indian Claims Commission in 1978 did not end claims litigation for the tribes, nor did it leave the tribes with the limited channels for relief available prior to 1946. The Court of Claims has jurisdiction over tribal claims against the United States accruing after August 13, 1946, if the

¹³ INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 48, 805-11 (L. Meriam ed.) (Baltimore: The Johns Hopkins Press, 1928).

¹⁴ Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70 to 70v-3).

¹⁵ § 2, 60 Stat. at 1050 (codified at 25 U.S.C. § 70a).

¹⁶ *Id.*

¹⁷ *Id.* Congress may waive specific defenses in particular cases, even after an initial decision. See Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (codified at 25 U.S.C. § 70s(b)) (authorizing Court of Claims to review merits of Commission decisions where court had found earlier that such review had been barred by res judicata); *United States v. Sioux Nation*, 100 S. Ct. 2716 (1980).

¹⁸ § 12, 60 Stat. at 1052 (codified at 25 U.S.C. § 70k). By 1977, awards by the Commission pursuant to the Act totalled in excess of \$800,000,000. See generally *Pierce, The Work of the Indian Claims Commission*, 63 A.B.A.J. 227, 229 (1977).

¹⁹ § 23, 60 Stat. at 1055 (codified at 25 U.S.C. § 70v).

²⁰ *E.g.*, Act of Mar. 30, 1972, Pub. L. No. 92-265, § 1, 86 Stat. 114; Act of Apr. 10, 1967, Pub. L. No. 90-9, § 1, 81 Stat. 11; Act of July 24, 1956, ch. 679, 70 Stat. 624.

²¹ Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990 (codified at 25 U.S.C. § 70v). For examples of cases so transferred, see *Order Certifying and Transferring Cases*, 39 Indian Cl. Comm'n 239 (1976); *Order Certifying and Transferring Cases*, 39 Indian Cl. Comm'n 261 (1976). See generally *UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT* (Washington: Government Printing Office, 1978).

claim arises under the Constitution, laws, or treaties of the United States, or executive orders of the President, or if the claim would otherwise be cognizable in the Court of Claims were the claimant not an Indian tribe.²² The grounds for relief in the Court of Claims, except for those cases transferred or appealed from the Indian Claims Commission, are not as broad as those moral or equitable claims available under the Indian Claims Commission Act.

2. Types of Tribal Claims

The grounds for most tribal claims against the federal government can be divided into three general categories. The first category consists of those claims arising from the government's action or inaction with regard to tribal land or natural resources. In such cases tribes have challenged the sale or other disposition of tribal land or land interests.

Prior to 1946, the Court of Claims entertained suits for damages under special jurisdictional acts.²³ Cases brought under such acts included complaints in which a tort,²⁴ a breach of the tribe's right of quiet enjoyment,²⁵ or a breach of contract claim arising from the extinguishment of tribal title was alleged.²⁶ But the jurisdictional acts often limited the extent to which relief was available. For example, proof of aboriginal title was held insufficient by the Supreme Court to support a claim for the taking of tribal lands when the Courts of Claims' jurisdiction over the suit was limited expressly to claims growing out of a treaty.²⁷

The Indian Claims Commission Act recognized a wider variety of claims within this category and included claims of inequitable and unfair treatment as well as recognized legal grounds for relief. More importantly, recovery before the Commission did not depend upon proof of recognized title in the real property that provided the basis for the claim.²⁸ Compensation for the taking of tribal land was possible even if the tribe's property interest was one of aboriginal title and therefore unrecognized.²⁹ A frequent claim under the Act was that the tribe's land interest was taken for less than adequate compensation.³⁰ In some instances, the disposition by the government was intentional,

²² 28 U.S.C. § 1505.

²³ See text at notes 8-12 *supra*.

²⁴ *Shoshone Tribe v. United States*, 82 Ct. Cl. 23 (1935), *rev'd on other grounds*, 299 U.S. 476 (1937).

²⁵ *E.g.*, *Mole Lake Band v. United States*, 139 F. Supp. 938 (Ct. Cl.), *cert. denied*, 352 U.S. 892 (1956); *Creek Nation v. United States*, 97 Ct. Cl. 591 (1942), *aff'd*, 318 U.S. 629 (1943); *Nez Percé Tribe v. United States*, 95 Ct. Cl. 1 (1941), *cert. denied*, 316 U.S. 686 (1942).

²⁶ *E.g.*, *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *Menominee Tribe v. United States*, 95 Ct. Cl. 232 (1941).

²⁷ *Northwestern Band of Shoshone Indians v. United States*, 95 Ct. Cl. 642 (1942), *aff'd*, 324 U.S. 335 (1945). See also *Klamath & Moadoc Tribes v. United States*, 81 Ct. Cl. 79, *aff'd*, 296 U.S. 244 (1935); *Sisseton & Wahpeton Bands of Sioux Indians v. United States*, 58 Ct. Cl. 302 (1923), *aff'd*, 277 U.S. 424 (1928); *Otoe & Missouri Tribes v. United States*, 52 Ct. Cl. 424 (1917); *Western Cherokee Indians v. United States*, 27 Ct. Cl. 1 (1891), *aff'd sub nom. United States v. Old Settlers*, 148 U.S. 427 (1893).

²⁸ See, *e.g.*, *Otoe & Missouri Tribe v. United States*, 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955); *Oneida Tribe v. United States*, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964).

²⁹ See, *e.g.*, *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967); *Upper Chehalis Tribe v. United States*, 155 F. Supp. 226 (Ct. Cl. 1957); *Otoe & Missouri Tribe v. United States*, 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955).

³⁰ See, *e.g.*, *Crow Tribe v. United States*, 284 F.2d 361 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961); *Miami Tribe v. United States*, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961).

with tribal land taken either for use by the federal government³¹ or to be granted to a state,³² another tribe,³³ or a private individual.³⁴ In other cases successful claims for compensation were based on an erroneous survey³⁵ or allotment³⁶ of tribal land, or on a deficiency in the land retained by or ceded to the tribe pursuant to a treaty or statute.³⁷ The failure of the federal government to discharge its trust responsibilities to protect or manage Indian land or property properly also has been recognized as a cognizable claim.³⁸

The types of post-1946 claims cognizable in the Court of Claims,³⁹ and in the district courts,⁴⁰ are somewhat less expansive than the types of claims entertained by the Indian Claims Commission. The jurisdiction of the Court of Claims is limited to claims "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or . . . [otherwise cognizable] in the Court of Claims if the claimant were not an Indian tribe, band, or group."⁴¹ Excluded from this jurisdiction are those claims based on

overruled in part on other grounds by Pawnee Indian Tribe v. United States, 301 F.2d 667 (Ct. Cl.) cert. denied, 370 U.S. 918 (1962); Osage Nation v. United States, 97 F. Supp. 381 (Ct. Cl.), cert. denied, 342 U.S. 896 (1951).

³¹ See, e.g., *Miami Tribe v. United States*, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961), *overruled in part on other grounds by Pawnee Indian Tribe v. United States*, 301 F.2d 667 (Ct. Cl.), *cert. denied*, 370 U.S. 918 (1962); *Mohave Tribe v. United States*, 7 Indian Cl. Comm'n 219, 242-43 (1959); *Snake or Paiute Indians v. United States*, 4 Indian Cl. Comm'n 608, 627 (1956).

³² See, e.g., *Fort Berthold Res. v. United States*, 390 F.2d 686 (Ct. Cl. 1968); *Minnesota Chippewa Tribe v. United States*, 29 Indian Cl. Comm'n 211 (1972). See also *Menominee Tribe v. United States*, 95 Ct. Cl. 232 (1941).

³³ See, e.g., *United States v. Cherokee Nation*, 474 F.2d 628 (Ct. Cl. 1973).

³⁴ See, e.g., *United States v. Northern Paiute Nation*, 490 F.2d 954 (Ct. Cl. 1974).

³⁵ See, e.g., *United States v. Creek Nation*, 427 F.2d 743 (Ct. Cl. 1970); *Sioux Tribe v. United States*, 111 F. Supp. 766 (Ct. Cl. 1953); *Fort Belknap Indian Comm. v. United States*, 11 Indian Cl. Comm'n 479, 489-95 (1962).

³⁶ See generally *Creek Nation v. United States*, 97 Ct. Cl. 602 (1942), *cert. denied*, 318 U.S. 787 (1943).

³⁷ See, e.g., *Yakima Tribe v. United States*, 158 Ct. Cl. 672 (1962). Recovery under the Indian Claims Commission Act was not limited to those instances in which tribal land itself was taken but also included cases in which the tribe's land interest was diminished by severance of resources such as timber or minerals. Mineral, timber, or water rights that were sold, leased, or otherwise alienated for less than adequate compensation were compensable; so were claims that the proceeds from such sales or leases were not credited to the tribe holding legal or equitable title. E.g., *United States v. Northern Paiute Nation*, 490 F.2d 954 (Ct. Cl. 1974) (mineral rights); *Minnesota Chippewa Tribe v. United States*, 29 Indian Cl. Comm'n 211, 236-39 (1972) (timber rights); *Gila River Pima-Maricopa Indian Comm. v. United States*, 29 Indian Cl. Comm'n 144, 145, 167 (1972) (water rights). Tribes have been held to be entitled to an accounting by the government for proceeds generated by the sale or lease of tribal resources. E.g., *Blackfeet & Gros Ventre Tribes v. United States*, 32 Indian Cl. Comm'n 65 (1973); *Fort Peck Indians v. United States*, 28 Indian Cl. Comm'n 171 (1972). Also cognizable were claims arising from an infringement or extinguishment of hunting and fishing rights recognized by treaty. E.g., *Three Affiliated Tribes of Fort Berthold Res. v. United States*, 16 Indian Cl. Comm'n 521 (1966) (claim for loss of game); *Makah Indian Tribe v. United States*, 7 Indian Cl. Comm'n 509 (1959) (fishing rights).

³⁸ *United States v. Oneida Nation*, 576 F.2d 870 (Ct. Cl. 1978); *United States v. Oneida Nation*, 477 F.2d 939 (Ct. Cl. 1973) (failure to protect tribe from improvident sale of lands to state of New York). But see *Six Nations v. United States*, 173 Ct. Cl. 899 (1965); *Seneca Nation v. United States*, 173 Ct. Cl. 917 (1965) (temporary existence of enemy status by hostile tribes suspended federal government's fiduciary obligations).

³⁹ 28 U.S.C. § 1505. See Ch. 6, Sec. A4a(2) *supra*.

⁴⁰ 28 U.S.C. § 1346(a) (2). See Ch. 6, Sec. A4a(2) *supra*.

⁴¹ 28 U.S.C. § 1505. See, e.g., *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966).

extinguishment of title to land held by unrecognized original Indian title that could have been litigated before the Indian Claims Commission.⁴²

Recovery for the taking of or injury to executive order reservations should be available in the Court of Claims since 28 U.S.C. § 1505 includes claims arising under "Executive orders of the President." The Indian Claims Commission has relied on similar language in its jurisdictional statute to uphold recovery for the extinguishment of title to executive order reservations.⁴³ The Supreme Court also once suggested that compensation for such actions might be afforded under the fair and honorable dealings section of the Commission's charter,⁴⁴ language not included within the post-1946 grant of jurisdiction of the Court of Claims. Based on this dictum it might be argued that recovery in the Court of Claims for extinguishment of or injury to unrecognized tribal title based on executive order is precluded. Since the Court of Claims jurisdiction is cast in terms of "Executive orders of the President," however, it is difficult to envision the claims intended by that provision if executive order title claims are excluded.

A second category of tribal claims arises from the government's administration of tribal funds. In such cases the tribe must show that the government has breached its fiduciary obligation to the tribe by mismanagement of the trust assets⁴⁵ or by violating statutory provisions intended for the protection of the assets.⁴⁶ Claims based upon a breach of the government's fiduciary duty to the tribe were cognizable in the Indian Claims Commission under the fair and honorable dealings provision of 25 U.S.C. § 70a(5).⁴⁷ Examples of such claims include the payment of government-assumed obligations from tribal funds,⁴⁸ deposit of funds into non-interest bearing accounts,⁴⁹ payment of royalty or other dividends in violation of treaty or agreement,⁵⁰ and claims arising from the government's administration of tribal property or contracts.⁵¹

⁴² See Ch. 6, Sec. A5 *supra*.

⁴³ *Fort Berthold Res. v. United States*, 390 F.2d 686 (Ct. Cl. 1968); *Confederated Tribes of Colville Res. v. United States*, 25 Indian Cl. Comm'n 99, 108-13 (1971).

⁴⁴ *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 n.22 (1949). See generally Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960); Sec. A2b *supra*. See also *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 49 (1946).

⁴⁵ See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 295-96 (1942); *United States v. Seminole Nation*, 173 F. Supp. 784 (Ct. Cl. 1959); *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944).

⁴⁶ E.g., *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1393 (Ct. Cl. 1975); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973); *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945). See also *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

⁴⁷ See Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D.L. REV. 359, 388-89 (1973); text at note 15 *supra*.

⁴⁸ See, e.g., *Fort Belknap Indian Comm. v. United States*, 11 Indian Cl. Comm'n 479, 508-19 (1962). But see *Choctaw Nation v. United States*, 91 Ct. Cl. 320 (1940), *cert. denied*, 312 U.S. 695 (1941).

⁴⁹ E.g., *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944). Cf. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (28 U.S.C. § 1346(a)(2) jurisdiction). *Contra*, *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

⁵⁰ See, e.g., *Seminole Nation v. United States*, 17 Indian Cl. Comm'n 67 (1966). Cf. *Seminole Nation v. United States*, 316 U.S. 286 (1942) (special jurisdictional statute).

⁵¹ Cf. *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966) (special jurisdictional statute).

For claims arising after 1946, recovery in the Court of Claims for breach of fiduciary obligation may be dependent upon showing breach of a statutory or treaty obligation of the government, since 28 U.S.C. § 1505 contains no provision similar to the fair and honorable dealings jurisdiction conferred upon the Indian Claims Commission. Thus, in *Cheyenne-Arapaho Tribes v. United States*,⁵² the Court of Claims relied upon the Secretary's statutory obligation to invest tribal funds consistent with the best interests of the Indians in finding the government liable for failing to manage trust property properly.

A final category of claims against the federal government involves intangible property interests created and protected by statute. These interests may be related to previously existing interests in real or personal property. In this kind of case, however, the statute itself creates a separate claim, which may or may not be related to or dependent upon showing any act or omission of the government toward the independent property interest. This type of claim is illustrated by the Act of September 7, 1976, which authorizes payment of claims for personal and property damages resulting from the failure of the Grand Teton Dam in 1976.⁵³ The Act expressly includes Indian tribes within the definition of persons whose interests are protected by the statute.⁵⁴ In this third category of property interests, jurisdiction necessarily depends on the act creating the claim.

The enactment of jurisdictional legislation does not necessarily create an intangible property interest in the tribe or impose liability upon the United States.⁵⁵ In *Creek Nation v. United States*,⁵⁶ the Court of Claims held that the Act of April 26, 1906, which authorized suits by the Secretary of the Interior on behalf of tribes, is permissive only and created no cause of action from the Secretary's failure to institute such suit. One major exception to the principle that the jurisdictional statutes are not themselves an independent source of liability is found in the grants of jurisdiction to the Indian Claims Commission in 25 U.S.C. § 70a. This section expressly created claims in certain areas not otherwise cognizable in law or equity. Indeed, section 70a(5) specifically envisioned litigation of claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."⁵⁷

3. Valuation of and Interest on Tribal Claims

If the United States is held to be liable to a tribe, the amount of damages to be awarded must be determined. It is also necessary to determine whether or not interest is to be awarded on the claim judgment and, if so, the amount of that interest.

In general, the proper valuation date for recovery in cases involving the sale or other disposition of tribal land or natural resources is the date of that sale

⁵² 512 F.2d 1390 (Ct. Cl. 1975). See *United States v. Mitchell*, 445 U.S. 535 (1980).

⁵³ Pub. L. No. 94-400, 90 Stat. 1211.

⁵⁴ § 10, 90 Stat. at 1214.

⁵⁵ See, e.g., *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 500 (1913); *Creek Nation v. United States*, 93 Ct. Cl. 1 (1941); *Chippewa Indians v. United States*, 88 Ct. Cl. 1 (1938), *aff'd*, 307 U.S. 1 (1939).

⁵⁶ 97 Ct. Cl. 591 (1942), *aff'd*, 318 U.S. 629 (1943).

⁵⁷ 25 U.S.C. § 70a(5) (emphasis added). See, e.g., *Osage Nation v. United States*, 1 Indian Cl. Comm'n 43, 82-86 (1948).

or disposition.⁵⁸ This valuation date is applicable regardless of whether the tribe's title was recognized or unrecognized prior to the conveyance.⁵⁹ The value of timber and mineral interests is to be included in determining the value of the land itself.⁶⁰ These interests are properly considered even if the tribe's title in the land is unrecognized, assuming that there is a right of recovery for unrecognized title under the appropriate jurisdictional act.

Valuation of the land interest at the time of its taking or injury requires consideration of a multitude of factors, including the location of the land, the sale price of similar lands, and actual use or disposition of the land after the taking.⁶¹ The date of valuation is that point at which the tribe is legally deprived of the land or land interest, even if a treaty or agreement ceding the land was never ratified.⁶²

Valuation of personal property claims based on a theory of mismanagement or breach of fiduciary obligation is more difficult and depends largely on the nature of the act or omission giving rise to the liability. The date of valuation is the date on which the act or omission occurred, to the extent that such a date can be ascertained. The loss or damage to the tribe is the value the tribal property interest would have had if the duty had not been breached, less the actual value of the property after the breach.⁶³

Interest generally is not recoverable on claims against the United States litigated before either the Court of Claims or the Indian Claims Commission.⁶⁴ Since the valuation date for many claims is often quite remote, failure to pay interest on the debt from the date a claim arose greatly diminishes recoverable damages.

There are two exceptions to the general rule that interest is not recoverable. First, interest may be recovered on claims if expressly authorized by statute.⁶⁵ Statutory authorization for payments of interest may depend upon a finding

⁵⁸ *E.g.*, *Creek Nation v. United States*, 302 U.S. 620 (1938) (lands held by tribe in fee simple); *United States v. Cherokee Nation*, 474 F.2d 628 (Ct. Cl. 1973) (lands held in fee simple).

⁵⁹ *E.g.*, *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 122-23 (1938); *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 912 (Ct. Cl. 1963); *Miami Tribe v. United States*, 175 F. Supp. 926, 942 (Ct. Cl. 1959). *Cf.* *United States v. Shoshone Tribe*, 304 U.S. 111 (1938) (tribe entitled to value of mineral and timber resources on reservation).

⁶⁰ *E.g.*, *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Sioux Tribe v. United States*, 146 F. Supp. 229, 238 (Ct. Cl. 1956); *Alcea Band of Tillamooks v. United States*, 87 F. Supp. 938 (Ct. Cl. 1950), *rev'd on other grounds*, 341 U.S. 48 (1951). *Contra*, *Yakima Tribe v. United States*, 158 Ct. Cl. 672, 693-99 (1962) (standing timber that cannot be logged commercially does not add significantly to commercial value of land).

⁶¹ *E.g.*, *Sioux Tribe v. United States*, 146 F. Supp. 229 (Ct. Cl. 1956); *Osage Nation v. United States*, 97 F. Supp. 381, 403 (Ct. Cl.), *cert. denied*, 342 U.S. 896 (1951); *Rogue River Tribe v. United States*, 89 F. Supp. 798, 803-07 (Ct. Cl. 1950), *cert. denied*, 341 U.S. 902 (1951).

⁶² *E.g.*, *Pillager Bands of Chippewa Indians v. United States*, 428 F.2d 1274 (Ct. Cl. 1970); *Sac & Fox Tribe v. United States*, 315 F.2d 896, 901 (Ct. Cl.), *cert. denied*, 375 U.S. 921 (1963) (treaty not ratified by tribal representatives).

⁶³ *E.g.*, *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1396 (Ct. Cl. 1975); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1245-47 (N.D. Cal. 1973); *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945).

⁶⁴ *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). *See also* *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *United States v. Goltra*, 312 U.S. 203, 207 (1941); *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 336 (1920); *Tillson v. United States*, 100 U.S. 43, 47 (1879).

⁶⁵ *Nez Percé Tribe v. United States*, 176 Ct. Cl. 815, 829-30 (1966), *cert. denied*, 386 U.S. 984 (1967).

that the government failed to comply with a treaty or statute directing compensation for ceded land to be deposited in interest-bearing accounts in the United States Treasury.⁶⁶ If the claim is predicated upon inadequate contractual consideration, however, no interest is due on any additional sums awarded to the tribe in excess of the agreed-upon compensation.⁶⁷ Another situation in which interest has been authorized by statute involves the failure to pay interest on tribal trust funds or to properly invest them when required by law.⁶⁸

The second exception to the no-interest rule involves claims based upon the taking clause of the fifth amendment.⁶⁹ Whenever the extinguishment of tribal title or infringement on tribal occupancy amounts to a taking under the fifth amendment, interest must be awarded on the judgment from the date the claim accrued, that is, from the date of the taking.⁷⁰

Not all interference with Indian title constitutes a taking.⁷¹ First, unless otherwise provided by statute, no extinguishment or interference with unrecognized title based on aboriginal possession constitutes a taking. In *Alcea Band of Tillamooks v. United States*,⁷² the Supreme Court held that no interest was due on a judgment claim predicated upon original Indian title since the claim did not constitute a taking within the purview of the fifth amendment. Second, even if tribal title is recognized, not all claims arising from interferences with or transfer of tribal land constitute takings.

Whether a claim constitutes a taking or an exercise of congressional regulatory power over Indian affairs depends upon the general tests for a taking under the fifth amendment⁷³ and on whether Congress has attempted to provide compensation for the interference. If the interference with recognized title is substantial and Congress has made no effort to afford compensation, the claim generally will be considered founded upon the taking clause, and interest awarded.⁷⁴ Similarly, if a court finds that an attempt by Congress to provide compensation for tribal land appropriated or sold by the government did not constitute a good faith effort to pay the full value of the lands when they were acquired, the tribe's claim is one for taking and will be

⁶⁶ See cases cited in note 49 *supra*.

⁶⁷ *E.g.*, *United States v. Kiowa, Comanche & Apache Tribes*, 163 F. Supp. 603, 609-10 (Ct. Cl. 1958); *Nez Percé Tribe v. United States*, 176 Ct. Cl. 815, 829-30 (1966), *cert. denied*, 386 U.S. 984 (1967).

⁶⁸ *See, e.g.*, *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

⁶⁹ U.S. CONST. amend. V. *See United States v. Sioux Nation*, 100 S. Ct. 2716, 2736-45 (1980).

⁷⁰ *See generally* B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (New Haven: Yale University Press, 1977).

⁷¹ *E.g.*, *United States v. Klamath & Modoc Tribes*, 304 U.S. 119, 123 (1938); *Shoshone Tribe v. United States*, 299 U.S. 476, 495 (1937); *United States v. Creek Nation*, 295 U.S. 103, 111 (1935).

⁷² 341 U.S. 48 (1951).

⁷³ *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (Washington: Government Printing Office, 1973); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). *See also* *Klamath & Modoc Tribes v. United States*, 436 F.2d 1008 (Ct. Cl.), *cert. denied*, 404 U.S. 950 (1971); *Uintah & White River Bands of Ute Indians v. United States*, 152 F. Supp. 953 (Ct. Cl. 1957).

⁷⁴ *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Pueblo of Taos*, 515 F.2d 1404 (Ct. Cl. 1975).

subject to interest.⁷⁵ In other circumstances government actions are construed by the courts to create contractual or fiduciary obligations, rather than exercises of the eminent domain power within the taking clause.⁷⁶ Accordingly, interest was not awarded by the Indian Claims Commission on certain claims based on inadequate compensation involving extinguishment of recognized tribal title.⁷⁷

4. Offsets to Claim Judgments

Offsets to damage claim judgments against the United States generally are allowed by statute. Under 28 U.S.C. § 1503, the Court of Claims has jurisdiction over demands for set-off made by the United States against any plaintiff, including an Indian tribe. A similar right of counterclaim or set-off often was recognized under the special jurisdictional acts that provided the basis for tribal damage claims prior to 1946.⁷⁸ In addition, under 25 U.S.C. § 70a, the Indian Claims Commission had authority to offset any money or property given to, or funds expended gratuitously for, the benefit of the plaintiff tribe if the Commission found that the nature of the tribe's claim and the entire course of dealings between the United States and the tribe warranted the offset.⁷⁹ Also subject to offset under section 70a were loans made to tribes from a revolving fund⁸⁰ established to provide expert assistance in the preparation and trial of damage claims before the Commission.⁸¹ But many government expenditures, including the cost of removing tribes from one site to another; expenditures made pursuant to the Indian Reorganization Act; monies spent for administrative, educational, health, or highway purposes; expenditures for food and rations; and certain aid that was part of the general federal Depression programs, were expressly exempted by statute from offset claims in actions before the Indian Claims Commission.⁸²

In *Blackfeet, Blood, Piegan & Gros Ventre Nations v. United States*,⁸³ the Blackfeet Nation and other tribes brought suit in the Court of Claims under a special jurisdictional act. The court held that land reserved for the tribe under an 1855 treaty had been taken under the Act of April 15, 1874.⁸⁴ The court allowed as an offset to the tribe's damage award various gratuitous expenditures made by the United States, including sums paid as salaries for

⁷⁵ *United States v. Sioux Nation*, 100 S. Ct. 2716, 2736-45 (1980); *Fort Berthold Res. v. United States*, 390 F.2d 686 (Ct. Cl. 1968).

⁷⁶ *E.g.*, *Klamath & Modoc Tribes v. United States*, 436 F.2d 1008 (Ct. Cl.), *cert. denied*, 404 U.S. 950 (1971); *Fort Berthold Res. v. United States*, 390 F.2d 686, 690-93 (Ct. Cl. 1968); *Osage Nation v. United States*, 97 F. Supp. 381 (Ct. Cl.), *cert. denied*, 342 U.S. 896 (1951).

⁷⁷ *E.g.*, *Fort Berthold Res. v. United States*, 390 F.2d 686 (Ct. Cl. 1968); *Pawnee Indian Tribe v. United States*, 301 F.2d 667 (Ct. Cl.), *cert. denied*, 370 U.S. 918 (1962).

⁷⁸ *E.g.*, Act of July 30, 1946, ch. 701, § 6, 60 Stat. 715, 716; Act of June 19, 1935, ch. 275, § 4, 49 Stat. 388, 389; Act of Mar. 13, 1924, ch. 54, 43 Stat. 21 (amended 1931).

⁷⁹ *See, e.g.*, *United States v. Assiniboine Tribes*, 428 F.2d 1324 (Ct. Cl. 1970); *Kickapoo Tribe v. United States*, 372 F.2d 980 (Ct. Cl. 1967); *United States v. Kiowa, Comanche & Apache Tribes*, 166 F. Supp. 939 (Ct. Cl. 1958), *cert. denied*, 359 U.S. 934 (1959).

⁸⁰ 25 U.S.C. § 70n-1.

⁸¹ *Id.* § 70n-4.

⁸² *Id.* § 70a. *See United States v. Pueblo de Zia*, 474 F.2d 639 (Ct. Cl. 1973) (emergency relief expenditures for purchase of lands for pueblo disallowed as offsets).

⁸³ 81 Ct. Cl. 101 (1935).

⁸⁴ Ch. 96, 18 Stat. 28.

Indian agents, police, and judges; the costs of maintaining and repairing Indian Agency buildings; and pro rata expenses for the education of tribal children.⁸⁵ Similarly, in *Shoshone Tribe v. United States*,⁸⁶ the Court of Claims awarded a judgment of approximately \$2.5 million to the plaintiff tribe but offset over \$1.5 million for gratuities and other expenditures made on behalf of the tribe by the United States.

Offsets to claims pending on or decided after August 12, 1935, in the Court of Claims are governed by 25 U.S.C. § 475a, which authorizes substantially more offsets than those recognized under the Indian Claims Commission Act. Under this provision the Court of Claims is directed to offset against any judgment award to a tribe "all sums expended gratuitously by the United States for the benefit of the said tribe or band." This section expressly excludes from such offsets only those sums spent on the tribe under the authority of the Indian Reorganization Act and certain federal governmental assistance that was part of any nationwide emergency programs (enacted primarily during the Depression) for relief of stricken agricultural areas or unemployment. Further, unlike the set-off provision in the Indian Claims Commission Act, section 475a does not confer discretion upon the Court of Claims to deny demonstrable offset claims based on the course of dealing between the parties or the nature of the tribe's claim.

5. Distribution

Damage claim judgments awarded by either the Court of Claims or the Indian Claims Commission are not self-executing. Congress must appropriate funds in satisfaction of the judgment,⁸⁷ after which the use or distribution of these funds can be determined.

~~Prior to October 19, 1973, the use or distribution of judgment funds largely was determined by special legislation enacted to approve tribal distribution plans for tribal claims awards.~~⁸⁸ Funds appropriated to satisfy tribal claims frequently were distributed to tribal members on a per capita basis.⁸⁹ If special legislation authorized per capita distribution, the Secretary of the Interior frequently was directed to prepare a roll of tribal members entitled to share in the proceeds of the judgment.⁹⁰ Participation by tribal officers in the preparation of such a roll often was mandated by the distribution statute.⁹¹ Other

⁸⁵ 81 Ct. Cl. at 137-41.

⁸⁶ 82 Ct. Cl. 23 (1935), *rev'd on other grounds*, 299 U.S. 476 (1937).

⁸⁷ See, e.g., Act of July 22, 1969, Pub. L. No. 91-47, 83 Stat. 49, 62; Act of Sept. 30, 1961, Pub. L. No. 87-332, 75 Stat. 733, 747; Act of Apr. 25, 1945, ch. 95, § 203, 59 Stat. 77, 94.

⁸⁸ E.g., Act of Sept. 27, 1967, Pub. L. No. 90-93, §§ 4-5, 81 Stat. 229 (codified at 25 U.S.C. § 1141); Act of Oct. 14, 1966, Pub. L. No. 89-660, § 2, 80 Stat. 910, 911 (codified at 25 U.S.C. § 1132); Act of July 17, 1959, Pub. L. No. 86-97, § 2, 73 Stat. 221, 222 (codified at 25 U.S.C. § 912).

⁸⁹ See, e.g., Act of Oct. 24, 1967, Pub. L. No. 90-114, § 2, 81 Stat. 335 (codified at 25 U.S.C. § 1152); Act of Oct. 9, 1962, Pub. L. No. 87-775, § 1, 76 Stat. 776 (codified at 25 U.S.C. § 991); Act of May 24, 1950, ch. 196, § 2, 64 Stat. 189, 190 (codified at 25 U.S.C. § 658).

⁹⁰ E.g., Act of June 2, 1972, Pub. L. No. 92-309, § 3, 86 Stat. 199, 200 (codified at 25 U.S.C. § 1124); Act of July 29, 1971, Pub. L. No. 92-59, § 2, 85 Stat. 158 (codified at 25 U.S.C. § 1242); Act of Sept. 21, 1968, Pub. L. No. 90-508, § 1, 82 Stat. 861 (codified at 25 U.S.C. § 1181).

⁹¹ E.g., Act of Dec. 31, 1975, Pub. L. No. 94-189, 89 Stat. 1093; Act of Sept. 28, 1968, Pub. L. No. 90-527, 82 Stat. 880; Act of Oct. 14, 1966, Pub. L. No. 89-659, § 2, 80 Stat. 909 (codified at 25 U.S.C. § 1112).

statutes provided that judgment awards be deposited in the United States Treasury to the credit of the tribe⁹² or credited to trust fund accounts established for the benefit of the tribe.⁹³ Per capita distribution of a specified portion of the judgment award, with the balance credited to the tribe, was another distribution scheme authorized by statutes governing the disposition of particular judgment funds.⁹⁴ Some of these special statutes expressly authorized the payment of tribal debts or expenses, including those arising from the claims litigation, out of the judgment award.⁹⁵

Since 1973 the use and distribution of tribal claims judgments awarded by either the Indian Claims Commission or the Court of Claims generally have been governed by the procedures set forth in 25 U.S.C. §§ 1401-1407.⁹⁶ Distribution pursuant to these sections requires preparation of a plan for distribution by the Secretary of the Interior in consultation with the affected tribe, and submission of the plan to Congress.⁹⁷ The plan becomes effective sixty days following its submission to Congress unless either house adopts a resolution disapproving it during that period.⁹⁸

No tribal member has an individual claim to or interest in a judgment as with other property belonging to Indian tribes. Congress and the affected tribe have the right to control the disposition and distribution of claim awards. Congress has the power to determine the members of the tribe entitled to

⁹² *E.g.*, Act of Oct. 3, 1972, Pub. L. No. 92-456, § 4, 86 Stat. 762 (codified at 25 U.S.C. § 1294); Act of Aug. 29, 1967, Pub. L. No. 90-76, § 1, 81 Stat. 177 (codified at 25 U.S.C. § 786); Act of May 18, 1928, ch. 624, § 6, 45 Stat. 602, 603 (codified at 25 U.S.C. § 656).

⁹³ *E.g.*, Act of Oct. 31, 1967, Pub. L. No. 90-117, § 2, 81 Stat. 337 (codified at 25 U.S.C. § 1162); Act of Aug. 1, 1967, Pub. L. No. 90-60, 81 Stat. 164 (codified as amended at 25 U.S.C. § 676a).

⁹⁴ *E.g.*, Act of Oct. 27, 1972, Pub. L. No. 92-586, § 1, 86 Stat. 1295 (codified at 25 U.S.C. § 883); Act of Nov. 2, 1966, Pub. L. No. 89-717, § 1, 80 Stat. 1114 (codified at 25 U.S.C. § 967a); Act of Mar. 17, 1972, Pub. L. No. 92-253, § 1, 86 Stat. 64 (codified at 25 U.S.C. § 1251).

⁹⁵ *E.g.*, Act of Sept. 27, 1967, Pub. L. No. 90-94, § 1, 81 Stat. 230 (codified at 25 U.S.C. § 594); Act of Oct. 1, 1965, Pub. L. No. 89-224, 79 Stat. 897 (codified at 25 U.S.C. §§ 565-565g). *But see* Act of Oct. 9, 1962, Pub. L. No. 87-775, § 5, 76 Stat. 776 (codified at 25 U.S.C. § 995); Act of July 27, 1939, ch. 387, § 7, 53 Stat. 1128, 1130 (codified at 25 U.S.C. § 1130).

⁹⁶ Originally enacted as the Act of Oct. 19, 1973, Pub. L. No. 93-134, 87 Stat. 466. *Cf.* Act of Dec. 31, 1975, Pub. L. No. 94-189, 89 Stat. 1093 (post-1973 special statute for distribution of claims to Sac and Fox Indians).

⁹⁷ 25 U.S.C. §§ 1402(a), 1403(a). The plan must be prepared and submitted within 180 days following the appropriation of funds to pay the judgment. *Id.* § 1402(a). Although Congress must appropriate funds to satisfy a claim judgment, this now occurs automatically for a judgment of the Court of Claims. The Secretary is directed to submit a plan best serving the interests of all tribal members entitled to receive a share of the judgment, after holding a hearing and giving due consideration to the testimony of leaders and members of the affected tribe. *Id.* § 1403(a). The Secretary is required to withhold a significant portion of the judgment from per capita distribution to serve common tribal needs, including education. Not less than 20% of the judgment must be set aside, unless the Secretary determines that particular circumstances of the affected tribe warrant otherwise. *Id.* § 1403(b) (5).

⁹⁸ *Id.* §§ 1403-1405. The disapproval provision, a procedure employed in recent years by Congress, raises an important constitutional question because of the requirement that legislation must be "passed" by both houses of Congress and presented to the President for his signature "before it becomes law." U.S. CONST. art. I, § 7. *See generally* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 75-77 (1977) (collection of cases and authorities and a brief discussion of this problem). *See also* Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

receive proportionate shares of tribal lands or funds.⁹⁹ This general power also includes the right to establish procedures to determine tribal membership for the distribution of damage claim awards if there is an appropriation satisfying the judgment and if per capita distribution of the judgment is intended by Congress.¹⁰⁰ Although distribution schemes enacted or approved by Congress are subject to judicial review,¹⁰¹ a distribution plan generally will not be disturbed if it is rationally tied to the government's unique obligation to the tribe.¹⁰²

In *Delaware Tribal Business Committee v. Weeks*¹⁰³ the Kansas Delawares challenged their exclusion from a distribution of funds appropriated in satisfaction of a claims judgment favoring the Delaware Indian Tribe. The Supreme Court held that the exclusion of the Kansas Delawares from a proportionate share of the damage award did not offend the equal protection guarantee of the fifth amendment because the Kansas Delawares, as individual Indians, had no vested right in any tribal property, including that appropriated by Congress,¹⁰⁴ and because limited distribution was rationally supported by administrative and historical considerations.¹⁰⁵

⁹⁹ E.g., *United States v. Jim*, 409 U.S. 80, 82-83 (1972); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306-07 (1902); *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899). See generally Ch. 11, Sec. A *infra*.

¹⁰⁰ See Ch. 1, Sec. C2 *supra*.

¹⁰¹ E.g., *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965) (three-judge court), *aff'd*, 384 U.S. 209 (1966).

¹⁰² E.g., *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965) (three-judge court), *aff'd*, 384 U.S. 209 (1966). Cf. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (Indian preference in federal employment upheld because rationally related to Congress' unique obligation to Indians).

¹⁰³ 430 U.S. 73 (1977).

¹⁰⁴ *Id.* at 85.

¹⁰⁵ *Id.* at 86-89.

d. *Federal Preemption*

Federal law protects tribal self-government within Indian country by preempting state laws;⁴⁷ particular federal statutes and programs preempt inconsistent state laws.⁴⁸ These doctrines have affected Indians' access to state-controlled rights and benefits in several ways, which are separately discussed below.

(1) *Federal Wardship, Trusteeship, and "Incompetence"*

At least one court decision denied political rights to Indians on the ground that they were wards of the federal government.⁴⁹ Sometimes this phrase has meant the equivalent of noncitizen Indians,⁵⁰ and to that extent it no longer has any validity. But the cited decision involved tribal Indians after citizenship and thus requires separate discussion.

The wardship terminology for Indians derives from the Supreme Court's opinion in *Cherokee Nation v. Georgia*.⁵¹ The Court held that the Cherokees did not constitute a "foreign state" as that term is used in article III of the Constitution, despite the practice of making treaties with the tribes.⁵² To explain that result, the Court described the tribes as "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."⁵³

Later Courts applied the analogy more literally. In *United States v. Kagama*,⁵⁴ the Court relied on wardship as a constitutional basis to sustain federal court jurisdiction over crimes by reservation Indians.⁵⁵ Other decisions have described individual Indians as wards of the federal government.⁵⁶

Despite the Courts' language, the federal-Indian relationship is unique and

Opsahl v. Johnson, 138 Minn. 42, 163 N.W. 988 (1917); *State ex rel. Crawford v. Norris*, 37 Neb. 299, 55 N.W. 1086 (1893).

Historically, a number of states declared that persons residing in federal enclaves would not be "residents" of the state for voting and other legal purposes. At least one state included Indian reservations in a statutory classification of this sort. A reservation Indian challenged this scheme in *Allen v. Merrell*, 6 Utah 2d 32, 305 P.2d 490 (1956), *vacated and remanded as moot*, 353 U.S. 932 (1957). While the case was pending before the United States Supreme Court, Utah amended its laws to delete the exclusion. In related contexts the Supreme Court has held laws of this sort unconstitutional. *Evans v. Cornman*, 398 U.S. 419 (1970) (National Institutes of Health); *Carrington v. Rash*, 380 U.S. 89 (1965) (military base). *Cf. Vlandis v. Kline*, 412 U.S. 441 (1973) (irrebuttable presumption of nonresidence for students violates Due Process Clause).

No state has classified reservation Indians in particular as nonresidents. In *County of Beltrami v. County of Hennepin*, 264 Minn. 406, 119 N.W.2d 25 (1963), the court held that a reservation Indian could not acquire "legal settlement," a special classification of domicile for welfare eligibility purposes. But the basis of the decision was federal preemption, *see text at notes 68, 81. infra*, not residence.

⁴⁷ *Williams v. Lee*, 358 U.S. 217 (1959). *See* Ch. 5, Sec. B *supra*.

⁴⁸ *United States v. Mazurie*, 419 U.S. 544 (1975). *See* Ch. 5, Sec. B *supra*.

⁴⁹ *Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (1928), *overruled by Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). *Cf. State ex rel. Williams v. Kemp*, 106 Mont. 444, 78 P.2d 585 (1938) ("ward" Indians classified separately from "emancipated" Indians for allocation of responsibility for welfare payments between state and its counties).

⁵⁰ *E.g., United States v. Rickert*, 188 U.S. 432, 445 (1903); *Felix v. Patrick*, 145 U.S. 317, 330 (1892); *Elk v. Wilkins*, 112 U.S. 94 (1884).

⁵¹ 30 U.S. (5 Pet.) 1 (1831).

⁵² *Id.* at 20.

⁵³ *Id.* at 17.

⁵⁴ 118 U.S. 375 (1886).

⁵⁵ *Id.* at 383-84. *See* Ch. 3, Sec. A *supra*.

⁵⁶ *E.g., United States v. Rickert*, 188 U.S. 432 (1903); *Elk v. Wilkins*, 112 U.S. 94 (1884).

differs in important ways from the common law of guardianship.⁵⁷ Federal guardianship of Indians arises out of the constitutional plan to delegate plenary authority over Indian affairs to the federal government and the duties of protection undertaken by treaty and federal statute.⁵⁸

Treaties and statutes in fact impose many restrictions on the alienation of Indian property, both tribal and individual.⁵⁹ Other restrictions include federal criminal laws applicable to Indian country⁶⁰ and federal liquor prohibition laws.⁶¹ The limitations on Indian property are often rather similar to those of a common law guardianship.⁶² The analogy ends there. In matters not subject to federal restrictions, Indians are as competent as other persons.⁶³ The general body of disabilities accompanying the common law status of ward does not apply independently of a federal statute. The point is well illustrated by Vice-President Charles Curtis, who remained an "incompetent" Indian with respect to his Indian allotment throughout a long career in public life at the highest levels of government.⁶⁴

Indian wardship or incompetency has continuing validity as a concept to sustain federal statutes and treaties which disable Indians or tribes from alienating their property.⁶⁵ The concept has also been relied on to justify other protective federal laws.⁶⁶ However, no generalized notion of Indian wardship or incompetency is a valid basis to deny Indians any rights or benefits available to other citizens.

(2) Tribal Self-Government

The exercise of rights by individual Indians as state residents or citizens has conflicted on occasion with tribal self-government. The right of an Indian to sue in a state court may be preempted by the tribal right of self-government if the claim arises in Indian country.⁶⁷ The right to mental health care may be unavailable because state courts lack authority to make involuntary commitments of reservation Indians.⁶⁸

⁵⁷ See Ch. 3, Sec. B *supra*. Common law guardianships are supervised by state courts. They usually are based on minority or mental incompetency and terminate when the disability ends.

⁵⁸ See Ch. 3, Secs. A, C2 *supra*.

⁵⁹ *E.g.*, 25 U.S.C. §§ 81, 177, 323-328, 348-349.

⁶⁰ *E.g.*, 18 U.S.C. §§ 1151-1153, 3242. See Ch. 6, Sec. A2 *supra*.

⁶¹ 18 U.S.C. §§ 1154, 1156. See Ch. 6, Sec. A2c *supra*.

⁶² See generally Ch. 11, Sec. B *supra*.

⁶³ See, *e.g.*, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (Indians competent to sue to vindicate rights in trust property).

⁶⁴ See THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY, current vol. C, at 7-8 (New York: James T. White & Co., 1930).

⁶⁵ *E.g.*, *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911).

⁶⁶ *E.g.*, *United States v. Kagama*, 118 U.S. 375 (1886).

⁶⁷ *Fisher v. District Court*, 424 U.S. 382 (1976) (right of Indian plaintiff to bring adoption proceeding in state court preempted by tribal right of self-government). See Ch. 5, Sec. B *supra*; Ch. 6, Sec. C2 *supra*.

⁶⁸ *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978). While the district court held that the state lacked authority and thus responsibility to care for a mentally ill reservation Indian, the court also held that the United States Indian Health Service had the duty to care for her under the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1675. The district court went on to say that the federal program preempted state jurisdiction independently of tribal self-government. The court of appeals affirmed the first two points and did not address the third.

In *Necklace v. Tribal Court*, 554 F.2d 845 (8th Cir. 1977), the court held that an Indian confined in a state hospital pursuant to a tribal court order was in tribal and not state custody for habeas corpus purposes. In *County of Beltrami v. County of Hennepin*, 264 Minn. 406, 119 N.W.2d 25 (1963), the court said that application of state welfare laws to a reservation Indian would interfere with tribal self-government. But the issue was allocation of welfare responsibility between two counties, and

1934 [IRA]⁹ and thus not eligible to participate in the IRA revolving loan fund.¹⁰

b. Loans from Tribal Trust Funds

With certain exceptions, tribal trust funds cannot be expended without specific appropriation from Congress.¹¹ Congress has often appropriated a part of tribal trust funds for loans to tribal members,¹² with tribal consent.¹³ These tribal funds generally are treated as revolving credit funds; loan repayments are returned to the funds for further loans.¹⁴ Loans have been available for a variety of purposes, including education and economic development.¹⁵ Regulations govern the relending of tribal funds to tribal members.¹⁶

Increasingly tribes are investing tribal funds with the advice of private investment consultants,¹⁷ although the Secretary must approve all investments and major expenditures of trust funds.¹⁸ To date a relatively small portion of tribal funds has been invested for reservation industrial development.¹⁹

c. Loans from Revolving Credit Funds

An Indian revolving loan fund was established in section 10 of the Indian Reorganization Act of 1934.²⁰ The Secretary of the Interior is authorized to make loans from the fund to incorporated tribes for economic development. Repaid loans are credited to the revolving fund.²¹ In making loans from this fund, the federal government may deal only with tribal authorities, who have sole responsibility for making loans to tribal members.²² Portions of the IRA did not apply to certain tribes in Oklahoma,²³ but the Oklahoma Indian Welfare Act of 1936 extended similar provisions to all Oklahoma tribes.²⁴ Additionally, the Oklahoma Act authorized loans to incorporated tribes, cooperative associations, and individuals.²⁵ The Navajo-Hopi Long-Range Rehabilitation

⁹ 25 U.S.C. §§ 461-479.

¹⁰ 1940 *Hearings*, *supra* note 6, at 168. See text at notes 21-42 *infra*.

¹¹ 25 U.S.C. § 123. Tribal trust funds are discussed in Ch. 9, Sec. D2 *supra*.

¹² *E.g.*, Appropriations Act of May 10, 1939, ch. 119, 53 Stat. 685, 698; Act of Aug. 28, 1937, ch. 874, § 2, 50 Stat. 872 (repealed 1954). See 1940 *Hearings*, *supra* note 6, at 175-79.

¹³ 25 U.S.C. § 476; 25 C.F.R. § 91.20 (1980).

¹⁴ *E.g.*, Act of Aug. 28, 1937, ch. 874, § 5, 50 Stat. 872, 873 (repealed 1954). See 1940 *Hearings*, *supra* note 6, at 178.

¹⁵ See 1940 *Hearings*, *supra* note 6, at 176-79.

¹⁶ 25 C.F.R. § 91.20 (1980).

¹⁷ A. SORKIN, *AMERICAN INDIANS AND FEDERAL AID* 453 (Washington: The Brookings Institution, 1971).

¹⁸ 25 C.F.R. § 91.20 (1980).

¹⁹ A. SORKIN, *supra* note 17, at 97-98.

²⁰ Ch. 576, § 10, 48 Stat. 984, 986 (codified as amended at 25 U.S.C. § 470). See generally Ch. 2, Sec. D2c-d *supra*. 25 U.S.C. § 473 applies this provision to Alaska Natives.

²¹ Interest and other charges collected on loans are credited to the fund under a 1941 statute. Act of June 28, 1941, ch. 259, § 1, 55 Stat. 303, 316 (codified at 25 U.S.C. § 470a). A 1950 statute provides that repayment of livestock loans be credited to the revolving fund. Act of May 24, 1950, ch. 197, § 2, 64 Stat. 190 (codified at 25 U.S.C. § 443).

²² See 25 C.F.R. §§ 91.2-3 (1980); Memo. Sol. Int., Dec. 6, 1935, reprinted in 1 *OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974*, at 583, 584 (Washington: Government Printing Office, n.d.).

²³ 25 U.S.C. § 473.

²⁴ *Id.* § 503. See Ch. 14, Sec. B1-2 *infra*.

²⁵ 25 U.S.C. § 506.