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INDIAN TRIBAL TRUST FUNDS

*"The duty of a trustee plainly is, even if he is the trustee of an Indian, to do the best he can for the benefit of his beneficiary."*¹

Introduction

The United States government has long managed most Indian tribal money. Frequently, however, the government's failure to make sound investment decisions has resulted in substantial losses to the tribes. Such losses have been difficult to redress, for there is still uncertainty concerning the standard of care to which the government must be held in managing these funds. Although the courts have borrowed terms from trust law in characterizing the government's position, its responsibilities have never been clearly delineated. Attempts by Indian tribes to clarify the relationship through litigation have been hindered by the fact that access to the courts was almost impossible before 1946. Although access has improved since then, it is still in the main provided by the Indian Claims Commission and the Court of Claims, both located in Washington, D.C., both distrusted and criticized by the tribes, and neither really serving as an effective forum for complaints of breach of trust.

Nonetheless, two alternative solutions to the problem of defining the government's responsibility in managing Indian funds have recently been proposed, one by a United States district court and one by the Indian Claims Commission. In *Manchester Band of Pomo Indians, Inc. v. United States*,² a federal district court in California held that the duties of the government as trustee of Indian funds must be measured by private trust law principles. Two months later, the Indian Claims Commission in *Te-Moak Bands of Western Shoshone Indians v. United States*³ concluded that the government as trustee of tribal funds fulfills its fiduciary duty merely by complying with statutes governing the management of Indian money, even though the rate of interest provided by statute is as low as 4 percent per annum.

1. 10 CONG. REC. 214 (1880) (remarks of Senator Edmunds).

2. 363 F. Supp. 1238 (N.D. Cal. 1973).

3. 31 Ind. Cl. Comm. 427 (1973), *reh. denied*, 33 Ind. Cl. Comm. 417 (1974), *rev'd in pertinent part sub nom. United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975).

Manchester Band and *Te-Moak* thus represent conflicting approaches to the question of what duties attach to the government-tribal relationship. Although the court in *Te-Moak* afforded less protection for tribes whose money is held by the government,⁴ both decisions recognize that the government must be held to a high standard of care in dealing with Indian funds. This note will argue first, that the term "trustee" best characterizes the government's role as manager of tribal funds; second, that common law trust principles most accurately define the basic obligations arising from a fiduciary relationship and most effectively enable a trustee, even the United States government, to guide his investments prudently; and third, that since accounting claims and suits for breach of fiduciary duty involve both legal and equitable remedies they are best handled by the federal district courts which have more expertise in applying trust law than does the Court of Claims or the Indian Claims Commission.

Trust Obligations

Before attempting to determine whether traditional trust law principles should be applied to the management of Indian tribal funds, it is necessary to determine what consequences such a determination would have. A trustee, when he assumes management of a trust, assumes certain basic duties. Perhaps the most important of these is the duty of loyalty: the duty "to administer the trust *solely* in the interest of the beneficiary."⁵ Thus, a trustee is accountable, even in the absence of a breach of trust, for any profits made by him because of his administration of the trust.⁶ A second basic duty is to make the trust property productive:⁷

In the case of money, it is normally the duty of the trustee to invest it so that it will produce an income. The trustee is liable if he fails

4. The Court of Claims reversed the Indian Claims Commission decision in *Te-Moak* as this note was in its final stages of preparation for publication. Since the note was not yet in galley form, I have been able to make some additions to the text where necessary to call the reader's attention to the fact of the reversal. For a detailed discussion of both the majority and the dissenting opinions, see notes 77-94 & accompanying text *infra*. I have not cut the discussion of the Indian Claims Commission's opinion in the text because the Supreme Court will eventually consider the issues raised by *Te-Moak* and *Manchester Band*, perhaps by certiorari review of the Court of Claims decision in *Te-Moak*.

5. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959) (emphasis added); see G.G. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543, at 473-82 (2d ed. 1960) [hereinafter cited as BOGERT].

6. RESTATEMENT (SECOND) OF TRUSTS § 203 (1959).

7. *Id.* § 181; see BOGERT, *supra* note 5, § 611.

to invest trust funds . . . for a period which is under all the circumstances unreasonably long.⁸

Third, a trustee is subject to the "prudent man rule": in managing the trust res he must exercise the degree of care, skill, and prudence which would be exercised by a reasonably prudent person in managing his own property.⁹ If the trustee has greater or special skill, he will be held to a higher standard.¹⁰ Further, so that the beneficiary can be apprised of actions taken with regard to the trust, the trustee is under duties to keep and render accounts¹¹ and to furnish information at the beneficiary's request.¹²

Sources of Trust Funds

The failure of the government to make tribal money productive has been the primary flaw in the government's management of Indian funds. Until approximately 1966,¹³ most Indian money was kept in accounts in the United States Treasury. Many of these accounts paid no interest at all; in no case did any account pay more than 5 percent interest. Since 1966, some of the tribal money has been taken from the Treasury and deposited in local banks.¹⁴ As a result of these investment practices, one tribe's money may be split into several accounts, with a dramatic loss of interest income to the Indian tribes. The amount of money involved is not insignificant: the sum held in trust has grown from 35 million dollars in 1904¹⁵ to 300 million dollars in fiscal 1973.¹⁶ By 1967, approximately one-half of this amount was deposited in banks,¹⁷ presumably at prevailing rates of interest. The

8. RESTATEMENT (SECOND) OF TRUSTS § 181, comment *c* (1959); see BOGERT, *supra* note 5, § 702 (1959).

9. RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

10. *Id.*

11. *Id.* § 172.

12. *Id.* § 173.

13. The Comptroller General reported to Congress in 1966 that "[u]ninvested cash deposited with the Treasury ranged from \$11.1 million to \$22.6 million during fiscal year 1964, and a substantial portion of these funds appeared to be in excess of current requirements." COMPTROLLER GENERAL, REPORT TO THE CONGRESS OF THE UNITED STATES, NEED FOR IMPROVEMENTS IN THE MANAGEMENT OF MONEYS HELD IN TRUST FOR INDIANS 4 (March, 1966).

14. A. SORKIN, AMERICAN INDIANS AND FEDERAL AID 139 (1971) [hereinafter cited as SORKIN].

15. 1 INDIAN AFFAIRS LAWS AND TREATIES 1022 (Kappler ed. 1904).

16. UNITED STATES TREASURY DEPT., COMBINED STATEMENT OF RECEIPTS, EXPENDITURES AND BALANCES OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1973, at 336.

17. SORKIN, *supra* note 14, at 137, 203, Table A-16.

other half, deposited in the Treasury, included 4.3 million dollars kept in so-called interest accounts, which earn no interest.¹⁸

The tribal money which is kept in the Treasury accounts has come from four basic sources. The earliest tribal funds derived from treaty commitments. Although the oldest treaties often provided for distribution of goods,¹⁹ sometimes on an annual basis,²⁰ the government eventually began to pay annuities to the tribe as a whole,²¹ to the men who had signed the treaty, or to those who agreed to settle on homesteads or to accept allotments of land.²² The funds created by treaty were usually either payments to tribes for land cessions, consideration for purchase of tracts of land, or compensation deposited in the Treasury after land had been seized.²³

The second type of Treasury fund consists of earnings from the use of tribal land, particularly from leases of grazing rights, timber rights, and oil, gas, and other mineral rights.²⁴

Judgments from the Indian Claims Commission and the Court of Claims comprise a third source of tribal funds.²⁵ When a judgment is

18. See *id.* at 139.

19. See, e.g., Treaty with the Creeks, Aug. 7, 1790, 7 Stat. 35, art. XII ("the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry.")

20. See, e.g., Treaty with the Delawares, June 7, 1803, 7 Stat. 74, art. III (150 bushels of salt per year in exchange for cession of large salt spring and 4 square miles surrounding it); Treaty with the Wyandots, Aug. 3, 1795, 7 Stat. 49, art. IV (goods worth \$20,000 at the time the treaty was signed and yearly forever "like and usefull goods, suited to the circumstances of the Indians," worth \$9,500); Treaty with the Cherokee, June 26, 1794, 7 Stat. 43, art. III ("goods suitable for their use, to the amount of five thousand dollars yearly").

21. See, e.g., Treaty with the Potawatomie, Oct. 2, 1818, 7 Stat. 185, art. III (perpetual annuity of \$2,500 in silver); Treaty with the Choctaw, Oct. 24, 1816, 7 Stat. 152, art. II (\$6,000 annually for 20 years).

22. See *Te-Moak Bands of Western Shoshone Indians v. United States*, 31 Ind. Cl. Comm. 427, 431 (1973); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 167 (1941) [hereinafter cited as COHEN].

23. See SORKIN, *supra* note 14, at 137.

24. *Id.* It has been settled since 1823 that the Indians have a right of occupancy in their land, but not a right to dispose of it at will. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). It was not until 1938 that this possessory interest was held to encompass beneficial ownership of the natural resources on and below the land. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938) (minerals and timber); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938) (timber). Indian land tenure has been treated exhaustively elsewhere. See generally COHEN, *supra* note 22, at 287-336; V. DELORIA, JR., *BEHIND THE TRIAL OF BROKEN TREATIES* 85-111 (1974) [hereinafter cited as DELORIA]; Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947); Gilbert & Taylor, *Indian Land Questions*, 8 ARIZ. L. REV. 102 (1966).

25. See notes 122-44 & accompanying text *infra*.

rendered against the United States, one portion is typically distributed to tribal members per capita (a much criticized practice),²⁶ while the remainder is deposited in the Treasury.²⁷

The last major category of tribal funds kept in the Treasury is a catch-all. It consists of funds containing "[a]ll miscellaneous revenues derived from Indian reservations . . . and *not* the result of the labor of any member of such tribe"²⁸ This fund is inaccurately named Indian Moneys, Proceeds of Labor (IMPL). At the time of the decision in *Te-Moak*, IMPL funds were kept in the Treasury at 4 percent simple interest per annum.

In addition to the four Treasury accounts, there is a fifth type of tribal account, which is typically deposited in local banks. These are the Individual Indian Money (IIM) accounts, managed by the Bureau of Indian Affairs (BIA) area office nearest the tribe.²⁹

A tribe may have a number of funds which fall within each of the five categories described above, and which earn varying rates of interest. For example, in *Menominee Tribe v. United States*,³⁰ the court discussed eight funds kept in the Treasury for the Menominees: "Menominee Fund" (5%); "Interest on Menominee Fund"; "Fulfilling Treaties with Menominees, Logs" (4%); "Interest on Fulfilling Treaties with Menominees, Logs"; "Menominee Log Fund" (5%); "Interest on Menominee Log Fund"; "Menominee 4% Fund" (an IMPL fund); and "Interest on Menominee 4% Fund."³¹ This proliferation of funds is in no way unusual; it results from a classification system which separates funds according to their sources, rather than demand the clear delineation of the relationship between the govern- by any logical scheme.

Development of the Trust Relationship

The steady increase in the amount of money held in trust for the Indians and the wide variety of accounts and interest rates available demand the clear delineation of the relationship between the govern-

26. See, e.g., SORKIN, *supra* note 14, at 145-46.

27. *Id.* at 137-38.

28. 25 U.S.C. § 155 (1970) (originally enacted as Act of March 3, 1883, ch. 141, § 1, 22 Stat. 590) (emphasis added).

29. "Individual Indian Moneys" is also a misnomer, because IIM accounts also contain deposits by tribal groups. See 25 C.F.R. §§ 104.1, 105.1, 105.9 (1975). Although individuals may withdraw money from the accounts, the fund itself is an aggregate; when it is deposited in a bank, the account is opened in the name of the BIA disbursing agent; see SORKIN, *supra* note 14, at 151-56.

30. 101 Ct. Cl. 10 (1944).

31. *Id.* (*passim*).

ment and the Indian tribes,³² particularly with respect to the government's role as manager of Indian funds.

That some type of special relationship exists between the Indian tribes and the government had been reiterated from the time of the early treaties³³ until the present.³⁴ Unfortunately, terms used to describe the relationship, such as "guardian and ward," "incompetent," and "trustee," have been used inconsistently and imprecisely in statutes and opinions.³⁵ For example, although Indians have frequently been referred to as "wards" of the United States government,³⁶ the noted Indian law scholar, Felix Cohen, factored out ten discrete connotations of the term as used in Indian law.³⁷ In fact, the guardian-ward rela-

32. Until very recently there was no scholarly work focusing in depth on the legal relationship between the United States and the American Indians, much less on the enforceability of trust duties against the government. This hiatus has been most ably filled by Professor Reid Peyton Chambers of the University of California at Los Angeles, an associate solicitor on leave from the Department of the Interior. His article will be an invaluable source for Indian law scholars. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) [hereinafter cited as Chambers]. Chambers's analysis of the origin and development of the trust relationship and its applicability to Congress and the Executive is more complete than the limited treatment necessitated by this note's focus on trust funds only. See *id.* at 1215-34.

33. "[Y]ou will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians." President George Washington, *quoted in* *Seneca Nation v. United States* 173 Ct. Cl. 912, 924 (1965) (emphasis omitted).

34. "[T]he special relationship between the Indian tribes and the Federal government . . . continues to carry immense moral and legal force." 6 WEEKLY COMPILATIONS OF PRESIDENTIAL DOCUMENTS 895 (message to Congress by President Richard M. Nixon, July 13, 1970). Congress recently passed a law establishing the American Indian Policy Review Commission. Act of Jan. 1, 1975, Pub. L. 93-580 §§ 1-7, 88 Stat. 1910. The commission has been granted broad investigative powers and has been directed to set up task forces to make studies of particular areas. *Id.* §§ 3-4. The first area of concern stated in the act is the "trust responsibility and Federal-Indian relationship, including treaty review." *Id.* § 4(a)(1). The commission must present a report to Congress and is scheduled to be dissolved six months after the presentation of the report or by June 30, 1977. *Id.* § 5(a).

35. "Incompetent," for example, may refer to a Native American in full possession of his mental faculties who holds a trust patent or restricted fee preventing him from alienating his land without prior approval of the Secretary of the Interior. Felix Cohen pointed out that "Charles Curtis, who, though he became Senator and Vice President of the United States, remained all his life an incompetent Indian . . ." COHEN, *supra* note 22, at 167.

36. "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights." *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

37. (1) "wards as domestic dependent nations;" (2) "wards as tribes subject to congressional power;" (3) "wards as individuals subject to congressional power;" (4) "wards as subjects of federal court jurisdiction;" (5) "wards as subjects of administrative

tionship has been used as often to justify the government's actions in taking away Indian land and money as it has been invoked for the protection of the tribes.³⁸

Certainly the most famous judicial articulation of the special relationship between the United States government and the Indian tribes was that of John Marshall in *Cherokee Nation v. Georgia*.³⁹ With characteristic legerdemain Marshall, while refusing to allow the Cherokees into court, still had a great deal to say on the general legal status of Indian tribes. He determined that the Cherokee Nation could not bring suit as a foreign nation against the State of Georgia, because tribes within the boundaries of the United States are not foreign nations, but "domestic dependent nations . . . in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."⁴⁰ Marshall's concept of the Indians as a simple untutored people in need of protection proved a popular one with the Court, which continued to describe their status in paternalistic and ambiguous phrases until the twentieth century.⁴¹

In the 1930's the Court began to describe the special relationship more precisely. Perhaps because the issue arose in cases dealing with the handling of tribal money and property, the Court also began to rely for the first time on analogies from trust law. In *United States v. Creek Nation*,⁴² the Court required that the government pay compensation for having improperly disposed of Creek tribal property. Because

power" (the BIA); (6) "wards as noncitizens;" (7) wards as allottees holding land subject to restrictions on alienation; (8) "wardship and inequality of bargaining power;" (9) "wards as subjects of federal bounty;" and (10) "wards as beneficiaries of a trust." COHEN, *supra* note 22, at 169-73.

38. "The history of litigation in the field of Indian law indicates that the United States claims its guardianship primarily when it is beneficial to its interests" DELORIA, *supra* note 24, at 159; see COHEN, *supra* note 22, at 171.

The term "trust relationship" will be used in this note to refer to that legal relationship which exists when the government either has legal title or holds real or personal property for the use of an individual or a tribe. The term "special relationship" will be used in all other instances. For a treatment of the fiduciary relationship which arises when the government holds a trust patent for an individual tribal member see Note, *A Remedy for a Breach of the Government-Indian Trust Duties*, 1 N.M.L. REV. 321 (1971).

39. 30 U.S. (5 Pet.) 1 (1831).

40. *Id.* at 17; cf. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See also Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969); Chambers, *supra* note 32, at 1217-23.

41. See, e.g., *Choctaw Nation v. United States*, 119 U.S. 1 (1886). "The recognized relation between the parties to this controversy . . . is that between a superior and an inferior, whereby the latter is placed under the care and control of the former" *Id.* at 28.

42. 295 U.S. 103 (1935).

it concluded that the United States stood in a fiduciary relationship to the tribe, the Court imposed liability even though the assignment of land resulted from an erroneous survey which was made in good faith.⁴³

In 1942 in *Seminole Nation v. United States*⁴⁴ the Court began explicitly to rely on trust law standards. The fiduciary in *Seminole Nation* was the Seminole General Council, which had earned a measure of notoriety for ensuring that money which came into its hands for distribution to members of the tribe never reached its rightful owners. The Court, reasoning that the council stood in a fiduciary capacity to the members of the nation, applied the rule that a third party paying money to a fiduciary whom he knows to be false to his trust becomes a participant in the resultant breach and liable to the beneficiary.⁴⁵ The case was remanded to the Court of Claims for a determination whether the government knew the council was corrupt when it paid \$66,000 to the council for disbursement. As to the government's obligations to the nation, the Court said:

[I]t has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.⁴⁶

In 1944, in *Menominee Tribe v. United States*,⁴⁷ the government was not a third party but was the primary fiduciary, and the issue concerned mismanagement of Menominee tribal funds. As the case was brought in the court of claims prior to the enactment of the 1946 Indian Claims Commission Act,⁴⁸ Congress had to pass a special jurisdictional act waiving sovereign immunity and specifying the type of relief to be granted.⁴⁹ This special act instructed the court to "apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary"⁵⁰ Applying this standard, the court found "wrongful handling" in the Secretary of the Interior's spending of money from interest-bearing tribal funds before using equally available non-interest-bearing funds.⁵¹

43. *Id.* at 109-10; *cf.* *Mott v. United States*, 283 U.S. 747, 750 (1931) (government can sue on behalf of Indian ward to regain money even though trust fund was wrongfully depleted by government employee charged with its administration).

44. 316 U.S. 286 (1942).

45. *Id.* at 296, *citing* RESTATEMENT OF TRUSTS § 321 (1935).

46. *Id.* at 297.

47. 101 Ct. Cl. 10 (1944).

48. See note 58 *infra*.

49. See note 58 *infra*.

50. 101 Ct. Cl. at 18. The court stated that the mandate of the jurisdictional act adds "little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." *Id.* at 19.

51. *Id.* at 20.

In addition, the court was greatly concerned by the fact that Congress had authorized the Secretary of the Interior to deposit the various trust funds in the Treasury instead of investing the money in bonds:

The Government, instead of investing the money, which it collected for the Indians, in the bonds of other obligors, as an ordinary trustee would have been required to do, authorized itself by statute to put the money into its own treasury, in effect to borrow the money from the Indians, giving them its promise to pay interest on some of the funds. A private trustee who borrowed the trust money for his own use would, by that conduct, be guilty of a breach of trust.⁵²

Since the tribe had not challenged the propriety of the government's keeping the money in the Treasury, however, the court reached only the narrow issue of which funds should have been depleted first.

In reviewing the statutes, including the IMPL act,⁵³ which had authorized deposit of the Menominee's funds in the Treasury, the court pointed out that the Secretary of the Interior, "under a duty to act in harmony with the Government's position as a fiduciary" was not limited in his duty by the statutes under which he acted.⁵⁴

Recent federal court and court of claims decisions regarding management of tribal trust property have relied on the above cases in applying fiduciary standards to the government.⁵⁵ The management of tribal money, however, has rarely been litigated since *Menominee Tribe*. The forbidding array of statutes which regulate trust funds and the in-

52. *Id.* See also *Menominee Tribe v. United States*, 67 F. Supp. 972, 975 (Ct. Cl. 1946) (defendant must deposit revenues in the Treasury within 30 days of receipt to fulfill "that fidelity which a fiduciary owes his cestui"); *Menominee Tribe v. United States*, 59 F. Supp. 137, 150 (Ct. Cl. 1945) (defendant's withdrawing money from a 5% fund to operate plaintiff's business and then depositing the withdrawn money into a 4% fund violated its fiduciary obligations).

53. See note 28 & accompanying text *supra*.

54. 101 Ct. Cl. at 21.

55. See, e.g., *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243, 1246 (N.D. Cal. 1973) (mismanagement of tribal trust funds); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (improper diversion of water from tribal lake); *Navajo Tribe v. United States*, 364 F.2d 320, 324 (Ct. Cl. 1966) (mismanagement of oil and gas leases); *United States v. Seminole Nation*, 137 F. Supp. 784, 789-90 (Ct. Cl. 1959) (improper land sale); *Menominee Tribe v. United States*, 101 Ct. Cl. 22, 39-40 (1944) (mismanagement of timber). *But cf.* *Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct. Cl. 487, 493-94, 498, *cert. denied*, 379 U.S. 946 (1964) (special relationship does not extend to duty to preserve timber from depredation by tribal members).

In his discussion of *Seminole Nation* and *Menominee Tribe*, Chambers cautions that "[t]hese two cases could be viewed narrowly as simply stating implied principles found in the special statutes conferring jurisdiction on the Court of Claims, and may thus not state principles of general law . . ." Chambers, *supra* note 32, at 1232. It is possible for a court of general jurisdiction to fasten on this point, but neither the *Manchester Band* court nor the *Pyramid Lake* court did so and both, as noted above, cited *Seminole Nation* as settled law.

consistent manner in which the various funds are either invested or deposited in the Treasury have discouraged the tribes from taking legal action. Consequently, the government has been benefiting from its special relationship to the Indian tribes by acquiring low interest and interest-free loans, but has avoided being burdened with duties and subjected to the remedies which normally inhere in a trust relationship.

The Development of an Equitable Remedy for Breach of Trust

In order to determine whether his money is being handled correctly, a beneficiary generally brings a suit for an accounting.⁵⁶ If the account rendered is unsatisfactory or shows mismanagement, a court may find the trustee liable and fix damages accordingly. If interest income has been lost owing to failure to make money productive, for instance, a court may include the lost interest in its computation of damages.⁵⁷

Accounting claims have comprised one of the major categories of claims adjudicated by the Indian Claims Commission.⁵⁸ The commission proceeds with accounting claims in much the same way as do courts of equity generally,⁵⁹ with any minor refinements largely due to the size and bureaucratic organization of the federal trustee. For instance, the commission has placed on the government a heavy burden to provide a report so detailed "that it may be readily ascertained whether plaintiffs' funds were properly managed."⁶⁰ Furthermore, the plaintiff is entitled to know whether or not any interest has been lost through dilatory practices either in depositing funds in the Treasury or in expending them.⁶¹

56. See notes 5-12 & accompanying text *supra*.

57. RESTATEMENT (SECOND) OF TRUSTS § 207 (1959).

58. The commission was created by the Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C.A. §§ 70-70v-2 (1963 & Pamphlet No. 1, 1975)). Before the commission was set up, a tribe could not even get into court without petitioning Congress for an act waiving sovereign immunity, granting jurisdiction to the Court of Claims, and setting forth both the specific claim that could be made and the relief that could be granted. Only 142 Indian claims were adjudicated in the 65 year period between the passage of the first jurisdictional act in 1881 and the passage of the Indian Claims Commission act. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 512 (1966) [hereinafter cited as Wilkinson].

59. See *Sioux Tribe v. United States*, 12 Ind. Cl. Comm. 541, 547-50 (1963). For the procedure generally used in suits for accounting see BOGERT, *supra* note 5, § 970.

60. *Mescalero Apache Tribe v. United States*, 23 Ind. Cl. Comm. 181, 185 (1970); see BOGERT, *supra* note 5, § 970, at 199-204.

61. *Te-Moak Bands of Western Shoshone Indians v. United States*, 23 Ind. Cl. Comm. 70, 80 (1970).

Te-Moak: The Commission's Delineation of Trust Obligations

In 1973 the Indian Claims Commission began to make a series of far-reaching decisions in accounting cases, the first of which was *Te-Moak Bands of Western Shoshone Indians v. United States*.⁶² In its 1974 report, the commission described *Te-Moak* as a landmark decision because "[a] definitive and final ruling on the questions involved in this case is a prerequisite to the final disposition of some fifty other accounting cases."⁶³

Te-Moak is a consolidations of separate accounting claims by the Western Shoshone Nation and the Mescalero Apache Tribe which raised the issue of the liability of the government for mismanagement of tribal IMPL funds. From 1883 until 1930, the government kept the IMPL money of all tribes in one non-interest-bearing account in the Treasury. This long term interest-free loan was ended in 1930 when Congress enacted 25 U.S.C. section 161b,⁶⁴ which required separate accounts to be created for each tribe and which provided for 4 percent simple interest to be paid annually on those accounts having balances over \$500. At that time, the government began paying 4 percent simple interest on the plaintiffs' IMPL funds.⁶⁵

The commission in *Te-Moak* reached two significant conclusions: (1) it held that IMPL funds were express trusts and (2) it decided to impose liability on the government for not investing the funds for the period 1883-1930.

The commission's delineation of the government's duties with respect to the trust funds in issue was based completely on statutes: "the duties of the United States with respect to the Indian tribes' moneys must be based on written law: the Constitution, treaties, and acts of Congress."⁶⁶ Its holding was anchored on a little used statute passed in 1841 which provides:

All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be

62. 31 Ind. Cl. Comm. 427 (1973), *reh. denied*, 33 Ind. Cl. Comm. 417 (1974), *rev'd in pertinent part sub nom.* *United States v. Mescalero Apache Tribe*, No. 2-74 (Ct. Cl., July 11, 1975).

63. 1974 IND. CL. COMM'N ANN. REP. 2.

64. Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584, *amending* Act of Feb. 12, 1929, ch. 178, 45 Stat. 1164 (codified at 25 U.S.C. § 161b (1970)).

65. At the same time, the defendants set up funds for the interest payments, entitled "Interest on Proceeds of Labor, Western Shoshone Indians" and "Interest on Proceeds of Labor, Mescalero Indians." These accounts earned no interest. The commission did not rule on these accounts, however, because it held they were not properly in issue. 31 Ind. Cl. Comm. at 525-26 n.54.

66. *Id.* at 430.

invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum.⁶⁷

The commission held that the 1841 act, though rarely cited, was still in effect⁶⁸ and was intended to be a mandate that all trust funds held by the government be made productive.⁶⁹

Its next step was a careful analysis of the 1883 act, the statute creating the IMPL fund, which states:

The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation . . . and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe⁷⁰

In an attempt to impose some duty on the government, the commission laboriously established that the language of the 1883 act met all the standards for the creation of an express trust.⁷¹ Therefore, the commission found that the 1841 act applied to the IMPL fund, and that the government was liable for its failure to invest the fund at 5 percent until 1930, when 25 U.S.C. section 161b explicitly provided for the fund to be kept in the Treasury at 4 percent simple interest.⁷²

In assessing damages, the commission determined that 5 percent interest compounded annually on the corpus of the fund represented one portion of the amount of defendant's liability to the plaintiffs—a portion which became liquidated in 1930 when 25 U.S.C. section 161b became effective and the fund was divided. Since at the time of the division of the fund the corpus of the trust was deficient by that same amount, the commission determined that the defendant was liable for the resultant shortages in the plaintiffs' respective accounts owing to its previous failure to invest. To compensate the plaintiffs for the loss of growth of their respective shares, it ordered that 4 percent simple interest be paid on the shortages.⁷³

67. 31 U.S.C. § 547a (1970) (originally enacted as Act of Sept. 11, 1841, ch. 25, § 2, 5 Stat. 465). See note 69 *infra*.

68. "[A] statute is not repealed by being forgotten, and must be enforced when rediscovered." 31 Ind. Cl. Comm. at 478, *citing* *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953).

69. It is no wonder the 1841 act has been largely ignored. In 1873, section 2 was codified in the Revised Statutes in the title concerning public moneys. When the United States Code was compiled in 1926, section 2 of the act was omitted, although it has never been repealed. In 1931, section 2 finally appeared in Title 31, Money & Finance, as section 547a. See 31 Ind. Cl. Comm. at 477-78.

70. Act of March 3, 1883, ch. 141, § 1, 22 Stat. 590 (codified at 25 U.S.C. § 155 (1970)).

71. 31 Ind. Cl. Comm. at 489-504.

72. See note 64 *supra*.

73. 31 Ind. Cl. Comm. at 523-27. The commission's method of calculating damages is set forth with some specificity here because it was the focus of one of the

The plaintiffs urged on their motion for rehearing that the commission follow *Manchester Band* and determine that 25 U.S.C. section 161b set only a guaranteed rate of return and did not allow the government to let IMPL funds lie in the Treasury at 4 percent when greater interest could be earned by other authorized investments.⁷⁴ The commission denied this motion, noting that it had no evidence before it that safe securities yielding more than 4 percent were in existence from 1930 to 1946.⁷⁵

In subsequent accounting claim decisions the commission has applied the same two-step process it developed in *Te-Moak*. It first examines the instrument creating the fund or account in issue to determine whether it creates a trust. If it so construes the fund, it applies the 1841 act as a measure of the government's liability.⁷⁶ Since the statute requires the fund to be invested in government securities yielding 5 percent interest, a tribe can be made whole only by the commission's assessment of damages at 5 percent of the fund, compounded annually.

The commission in recent accounting opinions has been cautious, as befits an administrative tribunal deciding a question of first impression with the knowledge that its decision will certainly be appealed. Nevertheless, this caution flaws the opinions. The fact that the decisions have based the government's duties completely on statutes has enabled the Court of Claims on appeal to reject not only the statutory construction adopted by the commission, but also any finding of a duty to make trust funds productive.

Mescalero Apache Tribe: The Court of Claims's Reversal of *Te-Moak*

An example of the consequences of the commission's approach is the Court of Claims reversal of *Te-Moak*.⁷⁷ In reversing the commission's major holding the court completely rejected the statutory construction which the administrative body had adopted. The ma-

principal objections to the decision successfully raised by the defendants on appeal. See notes 77-94 & accompanying text *infra*.

74. *Te-Moak Bands of Western Shoshone Indians v. United States*, 33 Ind. Cl. Comm. 417, 425 (1974) (opinion denying motion for rehearing).

75. *Id.*

76. See, e.g., *Fort Peck Indians v. United States*, 34 Ind. Cl. Comm. 24, 37-44 (1974) (non-interest-bearing accounts containing yearly interest payments are trust funds; government liable for failure to invest); *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65, 134-39 (1973) (land cession agreement which provided that unexpended balances of \$164,000 annual installments of payment be deposited in treasury created a trust; government liable for failure to invest).

77. *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *rev'g in pertinent part Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 31 Ind. Cl. Comm. 427 (1973). See note 4 *supra*.

jority's reasoning demonstrates the inadequacy and inequity of basing the government's trust fiduciary duties solely on statutes rather than on federal common law. Further, the decision serves as a paradigm of the inappropriateness of the Court of Claims as a forum for Indian tribes.⁷⁸

The opinion relied on two rules of law. First, the court stated that the statutory "no interest rule" bars the Court of Claims from awarding interest against the United States⁷⁹ "unless there is a contract or statute expressly providing for the payment of interest."⁸⁰ Second, the court exhumed the doctrine of sovereign immunity, which bars suit against the government unless the government expressly and unequivocally waives immunity.⁸¹

To the Court of Claims, the commission's award against the government was actually an award of interest masquerading as damages for lost profits.⁸² The court concluded that the commission had no jurisdiction to make such an award in the absence of specific statutes waiving sovereign immunity and giving the commission the necessary authority to award interest. The court held that the 1841 act did not provide the needed authority because "the Act did not require the payment by the United States of interest on any fund that was not expressly required to be productive by a contract, treaty, or statute."⁸³ Since no other statute expressly provided for payment of interest on IMPL funds before 1930, the court reasoned, interest could not be awarded against the government. The court also refused to find a waiver of sovereign immunity or authorization to award interest in the Indian Claims Commission Act.⁸⁴

Although the court purported to rely on the above two rules of law, it actually found determinative two facts which should never have influenced its opinion—the BIA's failure to apply the 1841 act and the cost to the government of imposing liability. With regard to administrative interpretation of the 1841 act, the court stated that "no one in the Executive Department of the Government considered the 1841 statute as authority to invest Indian trust funds, nor as a law requiring

78. See notes 134-44 & accompanying text *infra*.

79. 518 F.2d at 1314, 1316-21.

80. *Id.* at 1314-15, citing 28 U.S.C. § 2516(a) (1970).

81. *United States v. Mescalero Apache Tribe*, 518 F.2d at 1314. Chambers, calling the sovereign immunity doctrine "somewhat of a puzzle to all commentators who have considered it," notes that both the American Bar Association and the Administrative Conference of the United States have urged its abolition as a separate defense. Chambers, *supra* note 32, at 1242 & n.131.

82. 518 F.2d at 1322.

83. *Id.* at 1330.

84. *Id.* at 1332-33.

the Government to pay interest on such funds.”⁸⁵ Surely the Indian tribes will find little solace in the explanation that the BIA’s ignoring of statutes can have the effect of repealing them. Such repeal by implication may provide a ready excuse for the government whenever it faces charges of liability for bureaucratic ineptitude.

The most shocking aspect of the court’s decision, however, is that it appears to be based primarily on fiscal considerations. The court, ever willing to take the government at its word, stated, “the ultimate cost to the Government could be an astronomical amount. The Government estimates it could amount to billions of dollars.”⁸⁶ Although the court was quick to state that such concerns did “not govern the outcome of this suit,”⁸⁷ clearly they did.

Judge Davis’s dissenting opinion stressed the “plain words” of the 1841 act,⁸⁸ the folly of relying on inconsistent administrative interpretation of a statute,⁸⁹ and the completeness of the legislative history of the 1841 and 1880 acts.⁹⁰ In addition, Judge Davis would have found jurisdiction in that part of the Indian Claims Commission Act which established a new cause of action for “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.”⁹¹ This section of the Indian Claims Commission Act should have allowed the commission to apply standard trust law to the government, according to the dissent.⁹²

Manchester Band—A District Court’s Approach

Even Judge Davis’s analysis would not allow for the finding of an equitable right to enforce general trust duties against the government

85. *Id.* at 1325.

86. *Id.* at 1333. The government’s estimates are not necessarily reliable. The majority earlier quoted at length from a 1926 Supreme Court opinion and emphasized the following language: “It would require compound interest [on \$1,111,284.70] brought about by annual or semi-annual rests for near a century, an amount the Solicitor General suggests would be equal to the National Debt.” *Id.* at 28, quoting *Cherokee Nation v. United States*, 270 U.S. 476, 492 (1926) (emphasis omitted). Commissioner Blue, who authored *Te-Moak*, pointed out: “The Solicitor General mislead the court. The national debt in 1926 was \$19,643,216,000. Five percent interest on \$1,111,284.70 compounded annually for 88 years would amount to \$80,262,338, or about four-tenths of one percent of the 1926 national debt.” 31 Ind. Cl. Comm. at 530.

87. 518 F.2d at 1333.

88. *Id.* at 1335.

89. *Id.* at 1335-36.

90. *Id.* at 1336.

91. *Id.* at 1340, quoting 25 U.S.C. § 70a(5). See also Note, *Indians—Extent of the “Fair and Honorable Dealings” Section of the Indian Claims Commission Act*, 15 St. Louis U.L.J. 491 (1971), a case note on *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970).

92. 518 F.2d at 1340-41.

in the absence of the "fair and honorable dealings" section of the Indian Claims Commission Act.⁹³ The court in *Manchester Band of Pomo Indians, Inc. v. United States*,⁹⁴ relied on federal common law as well as statutory law and as a result had no difficulty in imposing liability on the United States.

The Manchester Band of Pomo Indians, which occupies a small rancheria in Northern California, was incorporated in 1938 under the Indian Reorganization Act.⁹⁵ The government had charge of three types of accounts for the band: an Indian money (IIM) account, maintained at the Sacramento Area Office of the BIA; an account in the United States Treasury; and accounts in various commercial banks.

The IIM account contained revenues from a dairy farm which the band had operated from 1938 until 1956. Although the band demanded an accounting for the entire period during which the account was maintained, the defendants furnished it with only a partial accounting. Together with the plaintiff's own inspection of the band's ledgers in the BIA Sacramento Office, this partial accounting showed that although the band had unobligated balances in this account ranging from a high of \$10,000 in 1946 to a low of \$100 in 1956, only two payments of interest, totalling \$26.31,⁹⁶ had ever been made. The average unobligated balance in the account was \$7,500, and from 1957 on the account showed a balance of approximately \$3,500. No interest had been paid on this account from 1947 until 1965.⁹⁷

In 1963, the band had begun to lease portions of its trust land. Proceeds from the leases had been deposited in the Treasury at 4 percent simple interest per annum.⁹⁸ Two payments had been credited late to the band's Treasury account. One of these payments, deposited ten months late, had not been credited with any interest. In 1966,

93. *Id.* at 1340. In an earlier case, Judge Davis stated that the Court of Claims has jurisdiction to review discretionary acts of BIA officials when claim is made that they have breached fiduciary duties. *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975). *Cheyenne-Arapaho* is, however, doubtful authority for any proposition. See note 145 *infra*.

94. 363 F. Supp. 1238 (N.D. Cal. 1973).

95. 25 U.S.C. §§ 461-79 (1970) (originally enacted as Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984). The act was intended to give tribes more autonomy. An incorporated tribe is eligible, for instance, to receive loans and other benefits from the government. See UNITED STATES SOLICITOR, DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 479-81 (1966).

96. \$15.31 in June, 1947 and \$11.00 in July, 1947. 363 F. Supp. at 1242.

97. *Id.* at 1247. (From the closing of the dairy farm until 1963, the band's only source of income was the proceeds from the farm.)

98. Although they are not IMPL funds, revenues from leases are treated in the same way as IMPL funds upon deposit in the Treasury. Compare 25 U.S.C. § 161a (1970) with 25 U.S.C. § 161b (1970). For regulations governing leasing of tribal lands see 25 C.F.R. §§ 131.1-20 (1975).

some of the annual interest earned on the band's Treasury account had been withdrawn and deposited in commercial banks at prevailing rates of interest.⁹⁹

On the basis of the above uncontroverted facts, United States District Court Judge Charles B. Renfrew had little difficulty in characterizing the government's management of the band's money as deficient. Furthermore, the court found it necessary to apply sanctions¹⁰⁰ as a result of the government's failure to comply with the court's discovery orders.¹⁰¹ Among fourteen facts found to be true in its sanction order, the court ruled that the defendants had borrowed the band's funds at a lower rate of interest than they could on the open market and that they had failed to show they had ever managed the band's money wisely.¹⁰²

In setting forth the statutory range of permissible investments for tribal funds, the court considered in the main the same statutes on which the commission had relied in *Te-Moak*. There were, however, two essential differences: (1) because income from leasing, and not IMPL funds, was in issue, the court discussed 25 U.S.C. section 161a¹⁰³ rather than 25 U.S.C. section 161b; and (2) the court considered other statutes governing all government-managed funds.

Judge Renfrew did not find it necessary to base his opinion on the seldom used 1841 act,¹⁰⁴ for to him all the statutes governing investments were examined as *alternatives* from which the government in its role as a reasonably prudent trustee was obligated to choose the wisest legal investments for its tribal beneficiary's funds. Echoing the words used by the court of claims in *Menominee Tribe*,¹⁰⁵ he stated:

The Secretary of the Interior is under a duty to act pursuant to the Government's fiduciary obligations, and he is not prevented from doing so by the statutes which authorize various investments for Indian trust funds.¹⁰⁶

The court began with the proposition that at the very least the defendants obligated themselves to pay 4 percent simple interest per annum on funds which are or can be held in the Treasury:

99. 363 F. Supp. at 1242.

100. See FED. R. Civ. P. 37(b)(2)(A).

101. Over two years elapsed after the interrogatories were propounded, and despite orders to compel and an order to show cause, the defendants were unable to give the court an adequate explanation for their delay. 363 F. Supp. at 1241.

102. See 363 F. Supp. at 1250-52.

103. Act of June 13, 1930, ch. 483, § 1, 46 Stat. 584, *amending* 25 U.S.C. § 161a (1970) (originally enacted as Act of Feb. 12, 1929, ch. 178, § 1, 45 Stat. 1164). Both section 161a and section 161b require that 4% simple interest be paid on tribal Treasury accounts having balances over \$500.

104. See notes 67-69 & accompanying text *supra*.

105. *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 21 (1944).

106. 363 F. Supp. at 1247.

[Section] 161a did not set a ceiling of 4 per cent interest, but rather a floor, or guaranteed return, of at least 4 per cent when there were no other investments which paid a higher rate of return which a reasonably prudent trustee would be authorized to make.¹⁰⁷

When higher returns are available, Judge Renfrew noted, 25 U.S.C. section 162a¹⁰⁸ gives the Secretary of the Interior discretion to deposit both community and individual funds in banks, public debt obligations of the United States, or "bonds, notes or other obligations which are unconditionally guaranteed as to both principal and interest by the United States."¹⁰⁹

The court recognized further that Congress has provided that *all* government-managed trust funds may be invested in such agency bonds and obligations as those issued by the Tennessee Valley Authority,¹¹⁰ the Federal Home Loan Banks,¹¹¹ Commodity Credit Corporation,¹¹² and the Federal National Mortgage Association.¹¹³ Not all of these debentures are unconditionally guaranteed by the United States as to both principal and interest, as 25 U.S.C. section 162a requires; however, because the cited investments are lawful for *all* Government-managed trust funds, of which Indian funds are a smaller class, the statutes authorizing purchase of these obligations necessarily enlarge the discretion given the secretary under section 162a.¹¹⁴ This conclusion was also reached by an associate solicitor in the Department of the Interior in a memorandum quoted in the opinion.¹¹⁵

Moreover, the court found that the applicable federal statutes merely define the *scope* of the Government's obligations; the *manner*

107. *Id.* at 1244.

108. 25 U.S.C. § 162a (1970) (originally enacted as Act of June 24, 1938, ch. 648, § 1, 52 Stat. 1037).

109. 363 F. Supp. at 1244, *citing* 25 U.S.C. § 162a (1970). For regulations governing such deposits see 25 C.F.R. §§ 105.1-17 (1975). Section 105.1 specifies "individual or tribal" funds. Section 105.9 provides that the bank accounts shall be opened in the name of the disbursing agent. It appears that it is by this process that IIM funds are mixed with tribal funds. It is but another indication of the confusion which often appears to reign in the BIA that section 105.1 of the regulations gives as authority for deposit of individual and tribal funds 25 U.S.C. section 162, which was repealed in 1938 by 25 U.S.C. section 162a. *See* 25 C.F.R. § 105.1 (1975).

110. 16 U.S.C. §§ 831n-4(d) (1970).

111. 12 U.S.C. § 1435 (1970).

112. 15 U.S.C. § 713a-4(1970).

113. 12 U.S.C. § 1723c (1970).

114. 363 F. Supp. at 1244-45.

115. *Id.* at 1244, *quoting* Associate Solicitor for Indian Affairs, Dep't of the Interior, MEMORANDUM TO THE COMMISSIONER OF THE BUREAU OF INDIAN AFFAIRS (May 3, 1968). The memorandum stated that 12 U.S.C. § 1723c "constitutes a grant of additional authority to permit the investment of tribal trust funds . . . in FNMA participation certificates guaranteed by the United States and other FNMA obligations which are not so guaranteed."

in which these obligations are to be carried out is governed by trust principles. To the court it is "unquestioned that the United States has a solemn trust obligation to the Indian people."¹¹⁶ It is also unquestioned that "conduct of the Government as a trustee is measured by the same standards applicable to private trustees."¹¹⁷

Measuring the government's management of the band's funds by private trust law standards, the court found that the government had breached both its duty of loyalty to the fiduciary and its duty to make the trust property productive. It therefore held the government liable for profits made from maladministration of the funds. Further, the court implied that the government ought to be held to a higher than average standard of care since it has a greater degree of skill than the ordinary investor.

The district court's approach is preferable to that of the commission because application of private trust law principles to the government provides the maximum investment flexibility.¹¹⁸ To treat the government as a private trustee is essentially to apply business standards, rather than lofty but ineffectual paternalistic criteria, to the relationship between tribes and the government. Such a business relationship could ensure the tribal officers a measure of control over investment policies. A tribe could elect, for instance, to keep some of its funds in a local bank which did not pay the highest rate of interest in order to encourage that bank to make loans to tribal members. Such flexibility would work to the advantage of both the powerful and organized tribes, which take a great interest in making sophisticated investments, and small tribes, such as the Manchester Pomos, which are often too busy trying to maintain what little land and identity they have to get significantly involved with investment of their funds.

Presently, over six million dollars in IMPL funds belonging to both large and small tribes is still kept in the Treasury at low rates of interest.¹¹⁹ Even when funds are taken out of the Treasury and invested, investment practices vary greatly not only from tribe to tribe, but also from fund to fund within a particular tribe. Judge Renfrew took note of this proliferation of separate funds within one tribe and pointed out that in certain situations separate funds could be commingled to provide a greater rate of return.¹²⁰ Commingling these

116. 363 F. Supp. at 1243.

117. *Id.* at 1245, citing *United States v. Mason*, 412 U.S. 391, 398 (1973).

118. The BIA since *Manchester Band* has instituted monthly accountings to the tribes. See *Manchester Band of Pomo Indians, Inc. v. United States*, Civil No. 50276 (N.D. Cal., filed Feb. 28, 1974) (judgment on accounting duties).

119. UNITED STATES TREASURY DEP'T, COMBINED STATEMENT OF RECEIPTS, EXPENDITURES & BALANCES OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1973, at 337.

120. 363 F. Supp. at 1248 n.3.

small funds is an excellent idea. The rationale behind the requirement that trust funds be separated is that the beneficiary will be protected if trustee accountability is ensured. It therefore seems completely arbitrary that simply because one tribe's accounts have different names and arise under different statutes and treaties they should be separated rather than combined to increase their earning power.

It is Judge Renfrew's straightforward application of trust law to the government which makes *Manchester Band* unique and characterizes it as the better reasoned of the recent decisions on fiduciary duties of the government toward Indian tribes. Although the Court of Claims and the Indian Claims Commission have consulted trust treatises and the *Restatement of Trusts* to a limited extent, no court has achieved as harmonious an interpretation of the federal common law of trusts and congressional intent, and as reasonable an application of common sense, as has the *Manchester* court.¹²¹

The District Court—A Better Forum

Although there are sound reasons for providing a forum to adjudicate legal problems which are unique to the Indian tribes, such as the interpretation of treaties, these considerations do not apply to the determination of fiduciary duties. Neither the Indian Claims Commission nor the Court of Claims has been a satisfactory forum for enforcing such obligations.

The Indian Claims Commission

The Indian Claims Commission has jurisdiction over five broad types of claims accruing before August 13, 1946,¹²² and including legal

121. In a recent decision, the Court of Claims apparently adopted a statutory scheme very similar to that set forth in *Manchester Band*, which it cited with approval. *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). *Cheyenne-Arapaho* was filed in the Court of Claims and was designed as a test case on the issue of the government's liability for mismanagement of trust funds. *Id.* at 1391-92. *Cheyenne-Arapaho* is doubtful authority for several reasons. First, the court found the case inappropriate for summary judgment and returned it to the trial division with instructions for the trial division to consider certain facts uncontroverted. *Id.* at 1395. See generally CT. CL. R. 101(a)-(h). These facts included the statutory scope of permissible investments and the government's liability for failure to invest the test plaintiffs' interest accounts. 512 F.2d at 1393-96. Second, *Mescalero Apache Tribe*, which reversed *Te-Moak*, casts considerable doubt on *Cheyenne-Arapaho's* statutory scheme, because the scheme relied on the 1841 act. In addition, *Cheyenne-Arapaho* indicated that the measure of damages should be the lost profits on the uninvested interest accounts. *Id.* at 1396. If the trial division were to apply this measure of damages on remand, the majority in *Mescalero Apache Tribe* would surely characterize the damages as an illegal award of interest against the government. (Judge Davis, who wrote the majority in *Cheyenne-Arapaho*, authored the dissent in *Mescalero Apache Tribe*.)

122. The commission recently ruled that when a wrongful action was going on at that date it has jurisdiction to order particular accounts carried forward in order to assess

and equitable tort and contract claims.¹²³ There are three major problems, however, in litigating accounting claims before the commission.¹²⁴ First, the commission has construed its broad jurisdictional mandate too narrowly;¹²⁵ second, it enforces its procedural rules too strictly;¹²⁶ and third, it moves too slowly in settling claims.¹²⁷ This last problem is particularly grave. *Te-Moak*, for instance, presumably filed before 1951, the jurisdictional cut-off date, was not decided by the commission until 1973. The Court of Claims did not deliver its opinion until 1975, and certiorari review by the Supreme Court would result in further delay.¹²⁸ The commission not only divided the original 370 claims into 611 dockets,¹²⁹ but also decided to adjudicate the dockets in separate liability and damages proceedings. Moreover, it commonly allows interlocutory appeals to the Court of Claims from even the most minor rulings.

In accounting claims, the major cause of delay is the government's reluctance to render clear accounts. The General Accounting Office (GAO) reports which serve as the government's accounts are often so sketchy as to defy attempts at clarification.¹³⁰ This problem is exacer-

the entire damage. *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65, 71-76 (1973). It subsequently applied that rule by ordering the government to bring up to date a certain non-interest-bearing account. *Fort Peck Indians v. United States*, 34 Ind. Cl. Comm. 24, 34-37 (1974).

123. 25 U.S.C. § 70a (1970). Section 70k of this title required all claims to be presented by 1951. During that period 370 claims were filed. 1974 IND. CL. COMM'N ANN. REP. 2.

124. For a general discussion of the history of the commission and a criticism of its handling of all types of Indian claims see DELORIA, *supra* note 38, at 207-28.

125. See Wilkinson, *supra* note 58, at 519. See generally Note, *Indians—Extent of the "Fair and Honorable Dealings" Section of the Indian Claims Commission Act*, 15 ST. LOUIS U.L.J. 491 (1971).

126. See *Te-Moak Bands of Western Shoshone Indians v. United States*, 33 Ind. Cl. Comm. 417, 419 (1974) (opinion denying motion for rehearing).

127. Originally, the commission was to have concluded its work by 1956. Act of Aug. 13, 1946, ch. 959, § 23, 60 Stat. 1049. It has been granted four extensions, the latest of which provides for dissolution by 1977. See 1972 IND. CL. COMM'N ANN. REP. 5. At the time of the commission's most recent report to Congress, 186 dockets were still pending, of which 70 were before the Court of Claims on appeal. 1974 IND. CL. COMM'N ANN. REP. 4.

128. See 25 U.S.C. § 70s (1970).

129. 1974 IND. CL. COMM'N ANN. REP. 2.

130. See *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65 (1973). The tribe had asked for an accounting of trust funds and land resources, specifically oil and gas resources. The GAO responded with a report which simply stated a lump sum, \$857,442.20, and which indicated that the sum had been deposited to three Blackfeet IMPL accounts. Since the deposits were not annualized, the commission could determine neither what portion of the above sum had been deposited to which account, nor when the money was collected and deposited. The tribes were therefore forced to come up with their own information by sorting through reports in files which the United

bated by the government's outright lack of compliance with the commission's orders to supplement the deficient accounts.¹³¹ In a recent accounting claim¹³² the commission pointed out that of six orders to supplement in the previous *seven* years, the government had complied with only one, *Te-Moak*. An entire section of the opinion was devoted to a discussion of delays in accounting cases. The Commission speculated that "[i]f the Government's failure to comply with our orders in accounting cases were deliberately adopted as a defense tactic it would indeed be an effective one."¹³³

The Court of Claims

The Court of Claims serves both as the appellate court for the Indian Claims Commission¹³⁴ and as a court of original¹³⁵ jurisdiction over tribal claims arising after August 13, 1946.¹³⁶ Today, therefore, a tribe wishing to charge the government with a breach of fiduciary duty would most probably bring suit in the Court of Claims.

The Court of Claims, however, is hardly the most convenient forum: like the Supreme Court its jurisdiction is nation wide, and a tribe must engage attorneys in Washington skilled in litigating in that court.¹³⁷ Further, the Court of Claims hampers its claimants with procedural rules which are narrower than those in the district court.¹³⁸

States Geological Survey had prepared on reservation mining operations. The result of the plaintiffs' effort was an exhibit which showed that while over twelve million cubic feet of natural gas was extracted during 1944, only \$78.84 in royalties was paid, and in 1945, for ten million cubic feet, no royalties were paid. 32 Ind. Cl. Comm. at 78-80. The commission's response to this rather startling information was "[t]o say the least, plaintiffs' exhibit 118 raises extremely serious questions about the adequacy of defendant's accounting." *Id.* at 80.

131. Compare 1974 IND. CL. COMM'N ANN. REP. 4 with 1972 IND. CL. COMM'N ANN. REP. 2-3.

132. *Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65, 143-44 (1973).

133. *Id.* at 146.

134. 25 U.S.C. § 70s (1970).

135. See note 146 *infra*. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 11 (2d ed. 1970).

136. Act of Aug. 13, 1946, ch. 959, § 24, 60 Stat. 1049 *as amended* 28 U.S.C. § 1505 (1970). The Supreme Court may exercise certiorari to review Court of Claims decisions. 28 U.S.C. § 1255 (1970).

137. Lawyers' fees in the Court of Claims can be considerably higher than the 10% maximum allowable in the Indian Claims Commission. One writer advances the opinion that the attorneys who lobbied for the passage of the act wanted to keep secure their more lucrative practice before the Court of Claims and consequently suggested the 1951 jurisdictional cutoff date. DELORIA, *supra* note 38, at 226.

138. Compare CT. CL. R. 71-92 with FED. R. CIV. P. 26-37. See Evans, *Current Procedures in the Court of Claims*, 55 GEO. L.J. 422 (1966) [hereinafter cited as Evans]. Although the court's rules were revised in 1969, Commissioner Evans' insights are still valuable.

For instance, leave of the court is required, upon a showing of good cause, for all discovery except written interrogatories;¹³⁹ although sanctions are available for recalcitrant government lawyers,¹⁴⁰ they are rarely imposed.¹⁴¹ As a pro-government forum the court has also been unduly influenced by fiscal considerations¹⁴² and arguments based on administrative convenience.¹⁴³ Finally, the claim of executive privilege is easily made in the court. A head of a department called to produce documents can merely refuse to produce them "when, in his opinion, compliance will be injurious to the public interest."¹⁴⁴

The District Court

Claims which primarily involve equitable remedies are peculiarly suited to a court of general jurisdiction, especially since the Court of Claims has jurisdiction only to award damages and is prevented from awarding specific relief.¹⁴⁵ The district court has more liberal discovery rules, is readily accessible to the tribes' own lawyers (whether reservation or nearby legal services lawyers), and has expertise in handling complex claims which involve both legal and equitable remedies. Consequently, a tribe may well prefer to have the option to bring a suit for accounting of tribal funds in the district court.

Manchester Band was brought under the Tucker Act, which gives the district court concurrent jurisdiction with the court of claims, but which limits recoverable damages to \$10,000.¹⁴⁶ A tribe could, however, bring an action for an accounting and breach of fiduciary duty in such a posture as to invoke the district court's federal question jurisdiction,¹⁴⁷ and thus to avoid the jurisdictional damage limit imposed by

139. See Ct. Cl. R. 71(a).

140. See, e.g., Ct. Cl. R. 76. Note that a party must have wilfully failed to obey an order to respond before the court can impose sanctions. Ct. Cl. R. 76(b).

141. Evans, *supra* note 138, at 439-40.

142. See *Te-Moak Bands of Western Shoshone Indians v. United States*, 31 Ind. Cl. Comm. 427, 529-30 (1973); Wilkinson, *supra* note 58, at 524-28. See note 86 *supra*.

143. See text accompanying note 85 *supra*.

144. Ct. Cl. R. 75(b) (calls for production of documents). For the rationale behind this rule, see Evans, *supra* note 138, at 428-35.

145. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962).

146. 28 U.S.C. §§ 1346(a), (d), 1491 (1970). Section 1346(a)(2) gives the district court jurisdiction over "[a]ny other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

147. A tribe would argue as follows: The scope of the government's trust relationship toward Indian tribes is a matter of federal common law. *United States v. Mason*, 412 U.S. 391, 397 n.9 (1973); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). Consequently, a suit raising questions about the

the Tucker Act. Judge Renfrew in *Manchester Band* indicated the way to such a posture by finding jurisdiction not only in the Tucker Act, but also in the Administrative Procedure Act (APA),¹⁴⁸ in the Mandamus Act,¹⁴⁹ and in 28 U.S.C. section 1362, which gives the district courts original jurisdiction over all civil actions brought by incorporated tribes in which a federal question is involved. Indeed, the Administrative Procedure Act has frequently served as a vehicle for tribes to challenge decisions of the Secretary of the Interior,¹⁵⁰ and incorporated tribes have also been successful in basing district court jurisdiction on the grant of federal question jurisdiction contained in 28 U.S.C. section 1362.¹⁵¹

Conclusion

*Manchester Band of Pomo Indians, Inc. v. United States*¹⁵² and *Te-Moak Bands of Western Shoshone Indians v. United States*,¹⁵³ two recent challenges to federal mismanagement of tribal funds, indicate that the judiciary may finally be ready to deal squarely with an ethical question of some magnitude—how the United States government can

government's management of trust funds would arise under the law of the United States and would raise a federal question. 28 U.S.C. § 1331 (1970). Indian tribes may bring such a suit in district court regardless of the amount in controversy. 28 U.S.C. § 1361 (1970).

148. 5 U.S.C. §§ 701-06 (1970). The APA provides for judicial review of agency action which is unreasonably delayed, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

149. 28 U.S.C. § 1361 (1970).

150. See, e.g., *Tooahnippah v. Hickel*, 397 U.S. 598 (1970) (allowed review of decision of regional solicitor of the Department of the Interior disapproving a will); *Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9th Cir. 1971) (APA and Mandamus Act held to grant jurisdiction to district court to compel agency action wrongfully withheld); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 258 (D.D.C. 1972) (regulation issued by Secretary of the Interior declared to be contrary to law.) The existence of a remedy under the Tucker Act should not preclude a tribe from seeking other relief. *National Helium Corp. v. Morton*, 455 F.2d 650, 654 (10th Cir. 1971) (the Court of Claims remedy held not to be preemptive merely because it sounds in contract) (jurisdiction asserted under the APA and the National Environmental Policy Act). But cf. *Warner v. Cox*, 487 F.2d 1301, 1306 (5th Cir. 1974) (APA invoked by contractor to circumvent the Court of Claims). In *Warner*, no jurisdictional basis other than the APA could be relied on and none of the substantive claims concerned anything but the payment of money. The action was obviously an action against the United States in the form of an action against its ministers.

151. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (intent of section 1362 was to remove the \$10,000 jurisdictional barrier).

152. 363 F. Supp. 1238 (N.D. Cal. 1973).

153. 31 Ind. Cl. Comm. 427 (1973) *reh. denied*, 33 Ind. Cl. Comm. 417 (1974), *rev'd in pertinent part sub nom.* *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975).

call itself the trustee for Indian tribes and yet hold large amounts of tribal money in its treasury at very little interest or at no interest at all. The problem is compounded by the fact that even when funds are invested, investment practices vary considerably.

That the existence of a trust relationship between the Indian tribes and the government has rarely been interpreted to carry with it the obligation of the trustee to manage wisely the property and money of those tribes is one of the many arcana of Indian law. For years the poorest ethnic group in the United States, the Indian tribes can ill afford to be the beneficiaries of a trust relationship in which the trustee is not held strictly accountable for fiscal mismanagement.

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