

dations.⁹⁴ None of these statutes imposes individual liability upon the members of the tribe; the liability imposed is purely tribal. It is, in the sense 'above defined,' corporate, and has been so described by the Court of Claims.⁹⁵ The extent to which Indian tribes have been subjected to suit under these and similar statutes is elsewhere noted.⁹⁶

The distinction between property rights of a tribe and rights of individual members is elsewhere analyzed in some detail,⁹⁷ and for the present it is pertinent only to cite examples of this corporate attribute of the Indian tribes.

In the case of *Fleming v. McCurtain*⁹⁸ the Supreme Court, per Holmes, J., referred to "the corporate existence of the nation as such." in construing a treaty provision granting a tract to the Choctaw Nation "in fee simple to them and their descendants to inure to them while they shall exist as a nation and live On It," and emphasized the distinction between the nation and its members, in reaching the conclusion that title to the tract rested with the former and that no trust was imposed in favor of the latter. The same distinction is confirmed in the case of *Gritts v. Fisher*,⁹⁹ holding that the particular members alive when the distribution of tribal property was ordered did not obtain any vested right which would preclude the legislature of the tribe and Congress from later decreeing that a new list of tribal members should participate in the property.¹⁰⁰

Another example of the distinction between tribal and individual property rights is found in claims cases which seek to distinguish between the claims of the tribe and the claims of individual members,¹⁰¹ holding that damages to members, through denial of education promised in treaty, are not damages to a tribe, except in a sense too remote to serve as a basis of recovery.

Further examples of the distinction between corporate liability and individual liability are found in the cases of *Parks v. Ross*¹⁰² and *Turner v. United States*,¹⁰³ the former case holding that an officer of a tribe was not personally responsible for the debts of the tribe; the latter case holding that the tribe itself was not liable at common law for torts committed by its members.¹⁰⁴

The distinction between tribe and members is emphasized in *United States v. Cherokee Nation*,¹⁰⁵ in holding that where Congress allows a tribe to bring suit not on its own behalf but on behalf of a designated class of individuals, some of them non-members, and excluding from the class certain members, the beneficial interest in a judgment rests in the class and not in the tribe.

The practical significance of the corporate concept lies in the form of analogical argument that proceeds from the fact that a tribe is treated as a corporation for some purposes to the conclusion that it may be so treated for other purposes.¹⁰⁶

⁹⁴ Act of March 3, 1885, 23 Stat. 362, 376; Act of March 3, 1891, 26 Stat. 851, see secs. 1, 3, *supra*.

⁹⁵ *Graham v. United States and Sioux Tribe*, 30 C. Cls. 318, 331-338 (1895).

⁹⁶ See sec. 5, *infra*.

⁹⁷ See Chapters 9 and 15.

⁹⁸ 215 U. S. 56, 61 (1909).

⁹⁹ 224 U. S. 640 (1912).

¹⁰⁰ And see analysis of status of Seminole lands in terms of "corporate capacity," in 26 Op. A. G. 340 (1907).

¹⁰¹ See, for example, *Sioux Tribe of Indians v. United States*, 84 C. Cls. 16 (1936), cert. den. 302 U. S. 740.

¹⁰² 11 How. 362 (1850).

¹⁰³ 248 U. S. 354 (1919), aff'g. 51 C. Cls. 125 (1916). See sec. 3, *supra*.

¹⁰⁴ Characteristic of holdings on tribal "entity" is the decision in *Crow Nation v. United States*, 81 C. Cls. 238 (1935), to the effect that a treaty or agreement with an Indian nation or tribe is binding upon all the bands and divisions thereof.

¹⁰⁵ 202 U. S. 101 (1906).

¹⁰⁶ See, for example, the opinion of the Supreme Court in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110 (1919), discussed in Chapter 20, see

Recognizing that the corporate existence and corporate powers of Indian tribes are at least subject to considerable uncertainties. Congress may enact special or general legislation providing for the issuance of charters of incorporation upon application by the Indian tribes. The constitutional power of Congress to incorporate an Indian tribe is clear.¹⁰⁷ The only general legislation on this subject is found in section 17 of the Act of June 18, 1934,¹⁰⁸ which provides for the establishment of tribal corporate status in the following language:

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe; *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Various special acts establish procedures for acquiring corporate status applicable to designated tribes or areas.

Section 1 of the Act of May 1, 1936,¹⁰⁹ extending the foregoing section to Alaska, contains the following proviso:

* * * That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936,¹¹⁰ provides:

Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting; *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984); *Provided*, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

Where the corporate status of an Indian tribe is established, it will ordinarily be held to be within the scope of federal legislation extending certain benefits to corporations. Thus it has been administratively determined¹¹¹ that the Pueblos of

9. And cf. G. F. Canfield, *Legal Position of the Indian* (1881), 15 Am. L. Rev. 21, 33.

¹⁰⁷ See Memo. Acting Sol. I. D., May 15, 1934, citing *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Lurton v. North River Bridge Co.*, 153 U. S. 525 (1894); *Pacific Railroad Removal Cases*, 115 U. S. 2 (1885).

¹⁰⁸ 48 Stat. 984, 988; 25 U. S. C. 477.

¹⁰⁹ 49 Stat. 1250, 48 U. S. C. 362.

¹¹⁰ 49 Stat. 1967, 25 U. S. C. 503.

¹¹¹ Op. Sol. I. D., M.28869, February 13, 1937, 56 I. D. 79.

New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act¹¹¹ conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized Corporate status, either under the Act of June 18, 1934, or otherwise.¹¹²

Where a tribe is incorporated under the Act of June 18, 1934,¹¹³ or similar legislation, the question may be raised, "How far does the incorporated tribe remain possessed of the rights and subject to the obligations vested in it prior to the issuance of its corporate charter?"

That an incorporated Indian tribe is not, responsible for debts contracted by individual members, jointly or severally, prior to incorporation was the holding of the Massachusetts Supreme Judicial Court in *Mayhew v. Gay Head*,¹¹⁴ where the court declared, *per Bigelow, C. J.*:

The claim which the plaintiff seeks to enforce is for a debt alleged to have been incurred by various persons belonging to the Gay Head tribe of Indians, now included within the district of Gay Head, for goods sold and delivered prior to the incorporation of said district by St. 1862, c. 184. The obvious and decisive objection to the enforcement of this claim is, that it is not due and owing from the "body politic and corporate" which that act creates. No contract, either express or implied, exists by force of which the corporate body can be held liable. There is no rule or principle of the common law by

¹¹¹ Act of June 28, 1934. 48 Stat 1269. 1270. 43 U. S. S. 315b.

¹¹² Sec. 17. 48 Stat. 984. 988, 25 U. S. C. 477.

¹¹³ 48 Stat. 984. 25 U. S. C. 461, et seq.

¹¹⁴ 95 Mass. 129 (1868). The statute of incorporation was Mass. St. 1862. c. 184.

virtue of which the creation of a municipal corporation can be held to convert the debts previously due, either jointly or severally, from the persons who become members of the new municipality, into corporate liabilities. In the absence of any express legislative enactment, the corporation cannot be said to be the successors of or in privity with its members, so as to be responsible for their previously existing liabilities. There is no legal identity between a corporation and the individuals who compose it. The corporate body is a distinct legal entity, and can be held liable only by showing some breach of corporate duty or contract. * * * (Pp. 134-135.)

While the distinction here specified between obligations of members and corporate obligations would probably be followed today, it does not follow that an obligation of the tribe as such would be dissolved by incorporation. In fact, the incorporation provisions of the Act of June 18, 1934, have been consistently interpreted by the administrative authorities of the Federal Government and by the tribes themselves as modifying only the structure of the tribe and not relieving it of any tribal obligations or depriving it of any tribal property. A customary provision of a tribal charter declares:¹¹⁵

7. No property rights of the Northern Cheyenne Tribe, as heretofore constituted, shall be in any way impaired by anything contained in this charter, and the tribal ownership of unallotted lands, whether or not assigned to the use of any particular individuals, is hereby expressly recognized. The individually owned property of members of the Tribe shall not be subject to any corporate debts or liabilities, without such owners' consent. Any existing lawful debts of the Tribe shall continue in force, except as such debts may be satisfied or cancelled pursuant to law.

¹¹⁵ Corporate Charter of the Northern Cheyenne Tribe of the Tongue River Reservation. ratified November 7, 1936.

SECTION 5. CONTRACTUAL CAPACITY

That an Indian tribe has legal capacity to enter into binding contracts is clearly established.¹¹⁶ Except where federal or tribal law otherwise provides, such contracts are subject to the same rules of contract law that are applied to contracts of non-Indians.

Thus it is held that contractual relations between a tribe and the United States may confer vested rights upon tribal members, which rights are not subject to invasion by Congress or the states.¹¹⁷ Likewise, it has been held that a convention or treaty between the Colony of New Jersey and the Delaware Tribe is a contract, constitutionally protected against impairment by the legislature of the State of New Jersey.¹¹⁸

In accordance with the usual rule, a tribe is not bound by a contract which is not made by a proper representative or agent of the tribe,¹¹⁹ although a tribe, like any other party, may be estopped from denying the authority of its agent by accepting the benefit of services for which he has contracted.¹²⁰ Again following the usual rule of contract law, the Supreme Court has held that a tribal representative is not personally liable on a contract signed in the name of the principal, or reasonably to be

construed as executed on behalf of such principal. This rule was laid down in *Parks v. Ross*,¹²¹ a case arising out of the forced migration of Cherokee Indians, in 1838 and 1839, from Georgia to what is now Oklahoma. John Ross, the Principal Chief of the Cherokee Nation, was authorized to contract for the hire of wagons to transport the Cherokee Indians and as much of their belongings as they had managed to save from the whites who had overrun their lands. One of the wagon owners who entered into such a contract later brought suit against John Ross to recover extra compensation to which he deemed himself entitled. The Supreme Court held that there was no basis for a claim against Principal Chief Ross, since he had entered into the contract on behalf of the tribe. The Court declared, *per Grier, J.*:

Now, it is an established rule of law, that an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government. As regards him the rule is, that he is not responsible on any contract he may make in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.

The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves. And though in a state of pupilage, and under the guardianship of the United States, this government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts

¹¹⁶ The argument noted in *United States v. Boyd*, 83 Fed. 547 (C. C. A. 4. 1897.). "That as said Indians are the wards of the nation, all Contracts made by them are void, unless they are approved by the proper officials of the government", is not supported by any statutes or judicial holdings. As to contracts involving tribal property, see Chapter 15, sec. 24.

¹¹⁷ *Choate v. Tropp*, 224 U. S. 665 (1912); *Board of Commissioners of Tulsa County v. United States*, 94 F. 2d. 450 (C. C. A. 10. 1938). affg. 19 F. Supp. 635 (D. C. N. D. Okla. 1937).

¹¹⁸ *New Jersey v. Wilson*, 7 Cranch 164 (1812).

¹¹⁹ *Pueblo of Santa Rosa v. Fall*, 273 U. S. 315 (1927). revg. 12 F. 2d 332 (App. D. C. 1926), discussed in Chapter 20, sec. 5.

¹²⁰ *Rollins and Presbrey v. United States*, 23 C. Cls. 106 (1888).

¹²¹ 11 How. 362 (1850).

of their nation, either to an individual of their own nation or a citizen of the United States. (P. 374.)

The usual rules of contract law relating to the interpretation of Contracts, the validity of releases, the statute of frauds, and various other matters have been affirmed in a considerable number of cases involving Indian tribes.¹²⁵ Congress, however, may and frequently does, modify the usual rules of contract law with respect to particular tribal agreements. Thus, for example, oral agreements may be given legal effect, by congressional legislation. In a case where such agreements would otherwise be deemed invalid. In the case of *Iowa Tribe of Indians v. United States*¹²⁶ the Court of Claims noted that while ordinarily the terms of a transfer of land must be spelled out within the four corners of a written instrument, where Congress, in view of the disparity of intelligence and bargaining power involved in an agreement between an Indian tribe and the Federal Government, had expressly authorized the court to pass upon "stipulations or agreements, whether written or oral,"¹²⁴ the Court was bound to give legal weight to oral assurances and explanations given to the Indians upon the execution of an agreement for land cession.

Where Congress has fixed the consideration for a tribal agreement releasing claims, the courts will not assume to reconsider the adequacy of the amount so fixed.¹²⁶ The courts have likewise refused to review the propriety of congressional legislation which in effect nullifies an assignment of proceeds of a judgment made by an Indian tribe to an attorney.¹²⁶

Certain special applications of general rules of contract law may be noted in the Indian cases. The usual rule that where disparity of bargaining power is found the contract will be interpreted in favor of the weaker party has particular application to agreements made between an Indian tribe and the United States.¹²⁷ This rule, however, has no application to contracts or agreements made between two Indian tribes.¹²⁸ The question of the effective date of an agreement between the United States and an Indian tribe arose in the case of *Beam v. United States and Sioux Indians*.¹²⁹ It was held that such agreements become effective only upon ratification by Congress, and that such ratification does not relate back to the date of the agreement so as to legalize acts which amounted to trespass if the agreement (for land cession) was not in effect.

There are few, if any, cases which give careful consideration to the question of what law is applicable to a contract made between an Indian tribe and third parties. In most cases the ordinary rules of the common law with respect to the execution and interpretation of contracts have been applied, by common consent of the parties. That tribal law is applicable to a contract by which one tribe was incorporated into another was the holding in the case of *Delaware Indians v. Cherokee Nation*,¹³⁰ in which the court declared:

The common law did not prevail in the Cherokee country * . . . The agreement must be construed with

¹²⁵ *Klamath and Modoc Tribes v. United States*, 296 U. S. 244 (1935), aff'd 81 C. Cls. 79 (1935); *Kirby v. United States*, 260 U. S. 423 (1922), aff'd 273 Fed. 391 (C. C. A. 9, 1921); *Sioux Tribe of Indians v. United States*, 84 C. Cls. 16 (1936), cert. den. 302 U. S. 740; *Green v. Menominee Tribe of Indians*, 46 C. Cls. 68 (1911), aff'd 233 U. S. 558 (1914); *Peel v. Choctaw Nation and United States*, 45 C. Cls. 154 (1910).

¹²⁶ 68 C. Cls. 585 (1929).

¹²⁷ Act of April 28, 1920, 41 Stat. 585, amended Joint Resolution of January 11, 1929, 45 Stat. 1073 (Iowa).

¹²⁸ *Klamath Indians v. United States*, 296 U. S. 244 (1935).

¹²⁹ *Kendall v. United States*, 1 C. Cls. 261 (1865), aff'd, 7 Wall. 113 (1868).

¹³⁰ *Iowa Tribe of Indians v. United States*, 68 C. Cls. 585 (1929).

¹³¹ See *Delaware Indians v. Cherokee Nation*, 38 C. Cls. 234, 249-250 (1903), aff'd 193 U. S. 127 (1904); *Choctaw Nation v. United States and Chickasaw Nation*, 83 C. Cls. 140 (1936), cert. den. 287 U. S. 643.

¹³² 43 C. Cls. 61 (1907).

¹³³ 38 C. Cls. 234 (1903).

reference to the constitution and laws of the Cherokee Nation. (P. 253.)

It is by no means clear, however, that this rule would apply to an agreement between a tribe and the United States.

The question of whether the state law of contract applies to a contract made by the United States, on behalf of an Indian tribe, with a third party was expressly left open in the case of *Kirby v. United States*,¹³¹ in which the Supreme Court said:

Whether the state statute [on penalties and liquidated damages] could affect a contract made by the United States on behalf of Indian wards need not be considered. (E'. 427.)

General doctrines of conflict of laws would justify the application of the law of the forum where the tribal law that is applicable is not shown. As was said by Caldwell, J., in *Davison v. Gibson*:¹³²

It is very well settled that it will not be presumed that the English common law is in force in any state not settled by English colonists. (*Whitford v. Railroad Co.*, 23 N. Y. 465; *Savage v. O'Neil*, 44 N. Y. 298; *Plato v. Mulhall*, 72 Mo. 522; *Marsters v. Lash*; 61 Cal. 622), and it has been expressly decided that it will not be presumed to be in force in the Creek nation (*Du Val v. Marshall*, 30 Ark. 230), or in the Indian Territory, (*Pyatt v. Powell*, 2 C. C. A. 367, 51 Fed. Rep. 551). . . .

If, therefore, the court had no means of ascertaining what the law or custom of the Creek nation was on this question it should have applied the law of the forum.

The interpretation of attorneys' contracts in connection with claims against the United States has been a source of considerable litigation.¹³³ No principles peculiar to Indian law appear to be involved in these cases.

The foregoing discussion of the validity and interpretation of contracts made by an Indian tribe assumes that the contract in question is not one forbidden by federal law. It must be recognized, however, that the Federal Government has seriously curtailed the contractual powers of an Indian tribe. Those restrictions which relate particularly to the disposition of real property will be considered in a subsequent chapter dealing with tribal property. A broader restriction upon the scope of tribal contracts was imposed by the Act of March 3, 1871,¹³⁴ as amended by the Act of May 21, 1872.¹³⁵ These provisions were embodied in the Revised Statutes as sections 2103 to 2106, and are now embodied in title 25 of the United States Code as sections 81 to 64. Section 81 contains this important provision:

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

The section then lists six distinct requirements as to form and manner of execution, the most important of which is the re-

¹³¹ 260 U. S. 423 (1922), aff'd 273 Fed. 391 (C. C. A. 9, 1921).

¹³² 56 Fed. 443 (C. C. A. 8, 1893).

¹³³ *Garland's Heirs v. Choctaw Nation*, 256 U. S. 439 (1921), s. c. 272 U. S. 728 (1927); *Eastern Cherokees v. United States*, 225 U. S. 572 (1912); *Green v. Dudley*, 217 U. S. 488 (1910); *Gilman v. McKee*, 159 U. S. 303 (1895); *In re Sanborn*, 148 U. S. 222 (1893); And see: *Contract with the Osage Nation of Indians*, 17 Op. A. G. 445 (1882); *cf. Gordon v. Gwydir*, 34 App. D. C. 508 (1910); *United States v. Crawford*, 47 Fed. 561 (C. C. W. D. Ark. 1891); *Eastern Cherokees v. United States*, 225 U. S. 572 (1912).

¹³⁴ 16 Stat. 544, 570.

¹³⁵ 17 Stat. 136.

quirement that such an agreement must "be executed before a judge Of a Court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

The section further provides that, "all contracts or agreements made in violation of this section shall be null and void * * *" and establishes a special procedure for suit to recover moneys improperly paid out by or on behalf of an Indian tribe under a prohibited contract.

Section 82 provides for departmental supervision of payments made "to any agent or attorney" under such contract or agreement. Section 83 provides for the prosecution of persons receiving money contrary to the provisions of sections 81 and 82, and provides that any district attorney who fails to prosecute such a case upon application shall be removed from office and that any person in the employ of the United States who shall assist in the making of such a contract shall be "dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same."

Section 84 provides that no assignment of any contract embraced by section 81 shall be valid unless approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

A specific modification of the foregoing statutory provisions was made by the Act of June 26, 1936,¹³⁶ which applied only to contracts made, and approved prior to that date and declared that as to such contracts the requirement of the original statute that the contract "have a fixed limited time to run, which shall be distinctly stated" and that the contract shall fix "the amount or rate per centum of the fee" should be considered satisfied by attorneys' contracts "for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specified percentage * * *."

In the case of *McMurray v. Choctaw Nation*,¹³⁷ the Court of Claims declared :

Section 2103, Revised Statutes, is a most stringent and protective enactment. The section points out in precise terms the method of contracting with Indian tribes * * *. If this method is not followed, any proceeding contrary thereto is absolutely void. Any money paid upon contracts not executed according to its terms and approved by the Secretary of the Interior and Commissioner of Indian Affairs may be recovered back by the Indians. (P. 495.)

The scope of the prohibitions imposed by the statutes in question was given careful consideration in two important Supreme Court cases. In the case of *Green v. Menominee Tribe*¹³⁸ it was held that this statute rendered invalid a contract between an Indian tribe and a licensed trader whereby the tribe undertook to compensate the trader for his services in making lumber equipment available to individual members of the tribe. The fact that a representative of the Interior Department participated in the making of the contract and was to participate in its performance was held not to remove the agreement from the prohibitions of the statute.

In *Pueblo of Santa Rosa v. Fall*¹³⁹ the prohibitory statute was held applicable to an alleged contract by which an attorney sought to prosecute certain claims on behalf of an alleged Indian pueblo of Arizona.

While the foregoing cases leave *some* doubt as to the exact scope of the statute, it is at least clear that the statute applies only to contracts with Indians "relative to their lands, or to any claims" and does not apply to matters not comprised within these two categories.

Some light is thrown upon the intended scope of the statute by the extensive report of the House Committee on Indian Affairs on the frauds which the statute was designed to circumvent, and the expected consequences of the legislation. In general the legislation was directed against the "godless robbery of those defenseless people" by attorneys and claim-agents.¹⁴⁰

The statutory restrictions upon tribal contracts have been modified by sections 16 and 17 of the Act of June 18, 1934.¹⁴¹ By the former section each tribe adopting a constitution under this act became entitled to employ legal counsel, the choice of counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior. The effect of this provision was thus stated in a memorandum of the Solicitor for the Interior Department:¹⁴²

The Minnesota Chippewa Tribe has organized and adopted a constitution and bylaws pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (49 Stat. 984). That section declares, among other things, that such an organized tribe shall have the power "to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior." Your proposed letter raises the question of whether the provision in section 16 just quoted supersedes as to contracts to which section 81, Title 25, U. S. C., otherwise would be applicable, the specific requirements set forth in said section 81. Section 81 is confined to a certain class of contracts; that is, contracts for services relating to Indian lands, or to any claims growing out of or in reference to annuities, installments or other moneys, claims, demands or thing under the laws or treaties with the United States, or official acts of any official thereof, or in any way connected with or due from the United States. Contracts not calling for the performance of legal services connected with any of the matters or things mentioned in section 81 obviously are controlled by section 16 of the Reorganization Act and may be entered into without regard to the requirements of section 81.

The Minnesota Chippewa contract provides for the performance of legal services in relation to claims of the tribes against the United States Government. This is the sort of contract to which section 81 applies and the requirements of that section should be observed unless they are superseded by section 16 of the Reorganization Act. To the extent of any conflict or inconsistency, it is clear that section 16 is controlling and supersedes the prior law. Requirements of the prior law not directly inconsistent or conflicting may also be superseded as to the particular kind of contract to which section 16 applies if such was the intent of Congress. A consideration of the general background and purpose of the Indian Reorganization Act leaves no doubt that the purpose of the statutory provision in question was to increase the scope of responsibility and discretion afforded the tribe in its dealings with attorneys. Earlier drafts of legislation contained provisions limiting the fees that might be charged. After considerable discussion before the Senate Committee (Hearings before the Committee on Indian Affairs, United States Senate, 73rd Congress, 2d session, S. 2755 and S. 3645, part 2, pages 244-247), it was decided that the Secretary of the Interior should have the added power to approve or veto the choice of counsel. This discussion would have been futile and the statutory provision would have been meaningless if the intention had

¹³⁶ 49 Stat. 1984, 25 U. S. C. 81a.

¹³⁷ 62 C. Cls. 458 (1926), cert. den. 276 U. S. 524 (1927).

¹³⁸ 233 U. S. 558 (1914). aff'g 47 C. Cls. 281 (1912).

¹³⁹ 273 U. S. 315 (1927). rev'g 12 F. 2d 332 (App. D. C. 1926).

¹⁴⁰ Investigation of Indian Frauds. H. Rept. No. 98, 42nd Cong., 3d

sess., March 3, 1873, especially pp. 4-7.

¹⁴¹ 48 Stat. 984, 987-988, 25 U. S. C. 476, 477.

¹⁴² Memo. Sol. I. D., January 23, 1937. Also see 25 C. F. R. 14.1-14.17, relative to the recognition of attorneys and agents to represent claimants of organized and unorganized tribes or individual claimants before the Indian Bureau and the Department of the Interior and 15.1-15.25, relative to attorney contracts with Indian tribes.

been to make those contracts subject to the provisions of section 81, Title 25 of the Code.

I am inclined to the view that insofar as contracts for the employment of legal counsel are concerned. Congress intended to empower the organized tribe to make such contracts, subject only to the limitations imposed by section 16 of the Reorganization Act. The matter is by no means free from difficulty, however, and it may be that the courts when called upon to consider the question, will hold that the two statutes should be treated as one and that the requirements of both in the absence of conflict or inconsistency must be observed. In this situation it is appreciated that attorneys may desire for their own protection to have the contract executed in conformity with the requirements of both statutes. Such appears to be the position of the attorneys seeking employment by the Minnesota Chippewa Tribe. Such a position is not unreasonable and I recommend that no objection be raised to approval of this or any other contract so executed.

Constitutions of Indian tribes adopted pursuant to the Act of June 18, 1934, generally contain some such provision as the following, in line with the statutory requirement on the point:¹⁴³

ARTICLE V. POWERS OF THE COMMUNITY COUNCIL

SECTION 1. Enumerated powers.—The council of the Fort Belknap Community shall have the following powers, the exercise of which shall be subject to popular referendum as provided hereafter:

(b) To employ legal counsel for the protection and advancement of the rights of the community and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

Apart from contracts involving a disposition of tribal property, the contracts made by chartered tribes are subject to the limitations imposed by the corporate charter. Typical of such limiting provisions are the following, taken from the charter of the Covelo Indian Community of the Round Valley Indian Reservation, California:¹⁴⁴

5. The Covelo Indian Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the Covelo Indian Community, shall have the following corporate powers * * *:

(d) To borrow money from the Indian Credit Fund in accordance with the terms of section 10 of the Act of June 18, 1934 (48 Stat. 984), or from any other governmental agency, or from any member or association of members of the Covelo Indian Community, and to use such funds directly for productive Community enterprises, or to loan money thus borrowed to individual members or associations of members of the Community: *Provided*, That the amount of indebtedness to which the Covelo Indian Community may subject itself, aside from loans from the Indian Credit Fund, shall not exceed \$10,000 except with the express approval of the Secretary of the Interior.

(e) To engage in any business that will further the economic well-being of the members of the Covelo Indian Community or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this Charter.

(f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this Charter, with any person, partnership, association, or corporation, with any

municipality or any county, or with the United States or the State of California, including agreements with the State of California for the rendition of public services: *Provided*, That any contract involving payment of money by the corporation in excess of \$2,000 in any one fiscal year other than a contract for the use of the revolving loan fund established under section 10 of the Act of June 18, 1934 (48 Stat. 984), shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(g) To pledge or assign chattels or future Community income due or to become due to the Community under any notes, leases, or other contracts whether or not such notes, leases, or contracts are in existence at the time, or from any source: *Provided*, That such agreements of pledge or assignment except to the Federal Government shall not extend more than ten years from the date of execution and shall not cover more than one-half of the net Community income in any one year: *And provided further*, That any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(h) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the Postal Savings Bank or with a bonded disbursing officer of the United States to the credit of the Covelo Indian Community.

The supervisory provisions of sections 5 (d), 5 (e), 5 (f), 5 (g), and 5 (h), above set forth, are subject to termination under section 6 of the corporate charter, which reads:

6. Upon the request of the Covelo Indian Community Council for the termination of any supervisory powers reserved to the Secretary of the Interior under Sections 5 (b) 3, 5 (c), 5 (d), 5 (f), 5 (g), 5 (h), and section 8 of this Charter, the Secretary of the Interior, if he shall approve such request, shall thereupon submit the question of such termination to the Covelo Indian Community for a referendum vote. The termination shall be effective upon ratification by a majority vote at an election in which at least 30 per cent of the adult members of the Covelo Indian Community residing on the reservation shall vote. If at any time after ten years from the effective date of this Charter, such request shall be made and the Secretary shall disapprove such request or fail to approve or disapprove it within 90 days after its receipt, the question of the termination of any such supervisory power may then be submitted by the Secretary of the Interior or by the Community Council to popular referendum of the adult members of the Covelo Indian Community actually living within the reservation and if the termination is approved by two-thirds of the eligible voters, it shall be effective.

By section 17 of the act quoted, each tribe receiving a charter of incorporation might be empowered thereby

to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, * * * and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation.

This provision has been construed as granting to the incorporated Indian tribes very extensive powers to contract with respect to all matters of tribal concern, including tribal property. The extent to which this section legalized agreements with respect to tribal property which were formerly prohibited is a matter which must be reserved for further discussion in connection with our analysis of tribal property rights.¹⁴⁵

¹⁴³ Constitution of the Fort Belknap Indian Community, approved December 13, 1935.

¹⁴⁴ Ratified November 6, 1937. Under the terms of this charter, the incorporated tribe handled all sales of Indian arts and crafts work at the San Francisco Fair in 1939.

¹⁴⁵ See Chapter 15, sec. 22.

SECTION 6. CAPACITY TO SUE

That Indian tribes may, under certain circumstances, sue and be sued is clear from the large number of such suits which are analyzed in this chapter and other chapters of this work. Since, however, nearly all such suits have been expressly authorized by general or special statutes, the question of whether an Indian tribe may sue or be sued in the absence of such express statutory authorization is more difficult to answer.

A. STATUTES AUTHORIZING SUITS BY TRIBES

Statutes authorizing suits by Indian tribes include: (a) jurisdictional acts authorizing suits against the United States, and sometimes against other tribes, in the Court of Claims, (b) statutes authorizing suits against third parties to determine questions of ownership, and (c) statutes authorizing suits against third parties to determine the measure of compensation due from third parties for property taken.

(a) Within the scope of this chapter it is not possible to include more than a simple reference to statutes conferring jurisdiction upon the Court of Claims to hear tribal claims,¹⁴⁶ cases in which these claims are adjudicated,¹⁴⁷ and statutes compromising claims.¹⁴⁸

The language of special jurisdictional acts varies so fundamentally from act to act that it is impossible to list any common principles applicable to all Indian claims cases and not applicable to other cases. There are certain maxims which frequently recur, in these cases, such as the maxim that acts authorizing suit on claims against the Government are to be narrowly construed,¹⁴⁹ that such acts will ordinarily be construed as granting a forum rather than determining liability, and that such acts will not be construed, in the absence of clear language to the contrary, as empowering a court to consider the justice or injustice of a law, treaty, or agreement.¹⁵⁰ It may be doubted however, whether these maxims show more than verbal uniformities, and they are certainly of little help in predicting the outcome of cases. Indian claims cases, like other Indian cases, involve questions with respect to tribal property rights, tribal powers, the powers of the Federal Government, and similar questions of substantive law, elsewhere considered,¹⁵¹ and which have a greater bearing upon the actual decisions in claims cases than any rules which might be derived from considerations limited purely to these cases.

(b) Various statutes provide for suits by Indian tribes against third parties to determine land ownership. Perhaps the most important of these statutes is the Pueblo Lands Act,¹⁵² which is discussed elsewhere.¹⁵³

(c) Tribal capacity to sue is implied in the various right-of-way statutes which permit appeals from administrative decisions on the amount of damages due for tribal property taken or damaged.¹⁵⁴

(d) As we have already noted, capacity to sue is *not* conferred by Article III, section 2, of the Federal Constitution

providing for federal Jurisdiction over controversies "between a state . . . and foreign states." The learned opinion of Chief Justice Marshall established the proposition, which has not since been questioned by any federal court, that an Indian tribe is not a foreign State within the meaning of this provision.

B. STATUTES AUTHORIZING SUITS AGAINST TRIBES

Just as there are various statutes allowing suits by Indian tribes, so there are a number of statutes which authorize suits against Indian tribes.

We have already noted and need not here reconsider, the various depredation statutes which authorized suits against Indian tribes and allowed, in effect, the execution of judgment upon the tribal funds of the tribe in the United States Treasury, subject to the approval of the Secretary of the Interior.¹⁵⁶

Congress has from time to time authorized various other suits against Indian tribes by private citizens. Thus, for example, the Act of May 29, 1908,¹⁵⁷ confers jurisdiction upon the Court of Claims to adjudicate a suit by designated traders against the Menominee tribe and members thereof, and requires that the secretary of the Interior

shall thereupon, in case judgments be against the said Menominee tribe of Indians as a tribe, direct the payment of said judgments out of any funds in the Treasury of the United States to the credit of said tribe, and who, in case judgments be against individual members of said Menominee tribe of Indians, shall, through the disbursing officers in charge of said Green Bay Agency, pay, from any annuity due or which may become due said Indian as an individual or as the head of a family from the United States or from the share of such Indian as an individual or as the head of a family in any distribution of tribal funds deposited in the Treasury of the United States, the amounts of such judgments to the claimants in whose favor such judgments have been rendered¹⁵⁸

C. JURISTIC CAPACITY IN THE ABSENCE OF SPECIFIC STATUTES

There remains the question of whether suit may be brought by or against an Indian tribe where Congress is silent.

The latter portion of this question is easier to answer than the former. We have noted that an Indian tribe is a municipality.¹⁵⁹ As such it would appear to be exempt from suit unless it has consented thereto or been subjected thereto by a superior power.

The general attitude of Congress and the courts towards suits against Indian tribes is clarified in an opinion of Caldwell, J., in *Thcho v. Choctaw Tribe of Indians*,¹⁶⁰ where it was held that a suit against an Indian tribe could not be maintained in the absence of clear congressional authorization.

The court declared:

It may be conceded that it would be competent for congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action

¹⁵⁶ *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831). See sec. 3, *supra*.
¹⁵⁷ See secs. 1 and 3, *supra*. Suits for depredations were "forever barred" unless brought within 3 years of the enactment of the Indian Depredation Act of March 3, 1891. *United States and Kiowa Indians v. Martinez*, 195 U. S. 469 (1904).

¹⁵⁸ 35 Stat. 444.

¹⁵⁹ Sec. 2 . . . The same act authorizes suits in the Court of Claims against the Choctaw Nation (sec. 5, 35 Stat. 445), against the Creek Nation (sec. 26, 35 Stat. 457), and against the Mississippi Choctaws (sec. 27, 35 Stat. 457).

¹⁶⁰ See sec. 3, *supra*.

¹⁶¹ 66 Fed. 372 (C. C. A. 8, 1895).

¹⁴⁶ See Chapter 19, sec. 3.

¹⁴⁷ See Chapter 19, sec. 3.

¹⁴⁸ Joint Resolution of June 19, 1902, 32 Stat. 744, 745 (Utes); Act Of February 9, 1925, 43 Stat. 820 (Omahas). See *Loyal Creek Claims-Attorneys Fees*, 24 Op. A. G. 623 (1903).

¹⁴⁹ *Choctaw and Chickasaw Nations v. United States*, 75 C. Cls. 494 (1932).

¹⁵⁰ *Otoe and Missouri Indians v. United States*, 52 C. Cls. 424 (1917)

¹⁵¹ See, particularly, Chapters 5 and 15.

¹⁵² Act of June 7, 1924, 43 Stat. 636, 637, 638, construed in *Pueblo de Taos v. Gusdorf*, 50 F. 2d 721 (C. C. A. 10, 1931); *Pueblo of Picuris v. Abeyta*, 50 F. 2d 12 (C. C. A. 10, 1931).

¹⁵³ See Chapter 20, sec. 4.

¹⁵⁴ *Cf. Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641 (1890).

in any court it might designate. Acts of congress have been passed, specially Conferring on the courts therein named jurisdiction, over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the Indian Territory to settle controversies between them and the United States and between themselves.

Among such acts are the following: "An act for the ascertainment of amount due the Choctaw Nation." 21 Stat. 504. Act of July 4, 1884 (23 Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company, 24 Stat. 73. An act granting the right of way to the Denison & Wichita Valley Railway Company through the Indian Territory. Id. 117. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company. Id. 446. An act granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through the Indian Territory. Id. 140. An act granting the right of way to Paris Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat 753.

The constitutional competency of congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case. (Pp. 373-374.)

• • • Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. "It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state." *Beers v. Arkansas*, 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all, of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, decided that under the constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was stricly adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state "is

substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion." *In re Ayers*, 123 U. S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms, (Pp. 375-376.)

There is at least language supporting the rule that a tribe cannot be sued without its consent, in the Supreme Court opinion in *Turner v. United States*.¹⁶¹ And in the case of *United States v. U. S. Fidelity & Guar. Co.*,¹⁶² the Circuit Court of Appeals for the Tenth Circuit declared, citing the two cases above noted :

• • • the Indian tribes, like the United States, are sovereigns immune from civil suit except when expressly authorized. (P. 810.)

In line with the policy set forth in the *Thebo* case, it has been held that where the tribe itself is not subject to suit, tribal officers cannot be sued on the basis of tribal obligations.¹⁶³

Although a tribe, as a municipality, is not subject to suit without its consent, it may be argued that a tribe has legal capacity to consent to such a suit. The power to consent to such suit must be regarded as cognate with the power to bring suit.

Some support for the view that an Indian tribe is capable of appearing in litigation as a plaintiff or voluntary defendant is found in the statement of the Supreme Court in *United States v. Cnrt&zria*:¹⁶⁴

It was settled in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, that under territorial laws enacted with congressional sanction each pueblo in New Mexico-meaning the Indians comprising the community-became a juristic person and enabled to sue and defend in respect of its lauds. (Pp. 442-443.)

This statement, standing by itself, could be given a limited scope on the ground that the Pueblos are statutory corporations. The fact remains, however, that the Supreme Court has entertained suits in which Indian tribes were parties litigant, without any question of legal capacity being raised. An outstanding case in point is the case of *Cherokee Nation v. Hitchcock*.¹⁶⁵ This was a suit brought by an Indian tribe against the Secretary Of the Interior. Although judgment was rendered for the defendant, no question was raised, apparently, as to the capacity of the principal plaintiff (individual members were joined as parties plaintiff) to bring the suit.

The decision of the Supreme Court in the *Coronado* case,¹⁶⁶ holding labor unions suable in view of the legislative recognition

¹⁶¹ 248 U.S. 354 (1919)

¹⁶² 106 F. 2d 804 (C C A 10, 1939).

¹⁶³ *Adams v. Murphy*, 165 Fed 304 (C. C. A. 8, 1908) (suit by attorney on tribal attorney's contract).

¹⁶⁴ 271 U. S. 432 (1926)

¹⁶⁵ 187 U. S. 294 (1902).

¹⁶⁶ *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922). And c. f. F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev 809, 813 (1935).

given them as subjects of rights and duties, and the extent to which such rights and duties have been recognized in Indian tribes,¹⁵⁷ suggests that the courts may hold that even a tribe not expressly chartered as a corporation may bring and defend suits.¹⁵⁸ There are, however, some dicta contra,¹⁵⁹ and in the absence of any clear holding, judgment must be reserved.

¹⁵⁷ See sec. 4, *supra*.

¹⁵⁸ The right to sue the United States of course presents an independent question.

The reason the Indians could not bring the suits suggested lies in the general immunity of the State and the United States from suit in the absence of consent. (*United States v. Minnesota*, 270 U. S. 181, 195 (1926).)

¹⁵⁹ In *Jaefer v. United States* and *Yuma Indians*, 27 C. Cls. 278 (1892), for instance, the Court of Claims, holding that the Indian Depredations Act of March 3, 1891, 26 Stat. 851, in allowing suits to be brought against tribes and execution to be made against tribal funds, did not require notice to the tribal defendants; declared (a) that

The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. Whenever they have

What can be said is that even if a tribe lacks legal capacity to appear in courts of proper jurisdiction against third parties, the objects of such a suit can frequently be attained by a representative suit brought by individual members of the tribe.¹⁷⁰

asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors. (P. 285.)

and (b) that the statute expressly required the service of notice upon the Attorney General, who was competent to protect the interests of the Indian tribe.

The first of these arguments is clearly unsound as regards individual Indians (see Chapter 8, sec. 6), and its soundness as applied to a tribal plaintiff or a tribe defending a suit to which it has consented may be seriously questioned.

¹⁷⁰ *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903); *Choate v. Trapp*, 224 U. S. 665 (1912); *Western Oherokees v. United States*, 27 C. Cls. 1 (1891). Cf. *Fleming v. McCurtain*, 215 U. S. 56 (1909) (suit in equity by and on behalf of some 13,000 persons, "all persons of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made").

SECTION 7. TRIBAL HUNTING. AND FISHING. RIGHTS

Rights of hunting and fishing guaranteed to Indian tribes by treaty¹⁷¹ or statute¹⁷² are in some respects treated as property rights, and are so dealt with in a following chapter.¹⁷³

¹⁷¹ Treaty of January 9, 1789, with the Wyandots and others, 7 Stat. 28; Treaty of August 3, 1795, with the Wyandots and others, 7 Stat. 49; Treaty of October 2, 1798, with the Cherokees, 7 Stat. 62; Treaty of August 13, 1803, with the Kaskaskias, 7 Stat. 78; Treaty of November 3, 1804, with the Sacs and Foxes, 7 Stat. 84; Treaty of July 4, 1805, with the Wyandots and others, 7 Stat. 87; Treaty of December 30, 1805, with the Piankshaws, 7 Stat. 100; Treaty of January 7, 1806, with the Cherokees, 7 Stat. 101; Treaty of November 17, 1807, with the Ottoways and others, 7 Stat. 105; Treaty of November 10, 1808, with the Osage Nations, 7 Stat. 107; Treaty of November 25, 1808, with the Chippewas and others, 7 Stat. 112; Treaty of September 30, 1809, with the Delawares and others, 7 Stat. 113; Treaty of December 9, 1809, with the Kickapoos, 7 Stat. 117; Treaty of August 24, 1816, with the Ottawas, Chipawas, and Pottowotomees, 7 Stat. 146; Treaty of September 29, 1817, with the Wyandots and others, 7 Stat. 160; Treaty of August 24, 1818, with the Quapaws, 7 Stat. 176; Treaty of September 24, 1819, with the Chippewas, 7 Stat. 203; Treaty of June 16, 1820, with the Chippewas, 7 Stat. 206; Treaty of August 29, 1821, with the Ottawas, Chippewas, and Pottawatomes, 7 Stat. 218; Treaty of August 4, 1824, with the Sock and Fox tribes, 7 Stat. 229; Treaty of November 15, 1824, with the Quapaws, 7 Stat. 232; Treaty of August 19, 1825, with Sioux Chippewas, and others, 7 Stat. 272; Treaty of August 5, 1826, with the Chippewas, 7 Stat. 290; Treaty of October 16, 1826, with the Potawatamies, 7 Stat. 295; Treaty of October 23, 1826, with the Miamies 7 Stat. 300; Treaty of July 29, 1829, with the Chippewas and others 7 Stat. 320; Treaty of February 8, 1831, with the Menomonees, 7 Stat. 342; Treaty of September 15, 1832, with the Winnebagoes, 7 Stat. 370; Treaty of September 21, 1832, with the Sacs and Foxes, 7 Stat. 374; Treaty of October 20, 1832, with the Potawatamies, 7 Stat. 378; Treaty of September 26, 1833, with the Chippewa, Ottawa, and Potawatamie Nation, 7 Stat. 431; Treaty of October 9, 1833, with the Pawnees, 7 Stat. 448; Treaty of August 24, 1835, with the Comanches and Wichitaaws, 7 Stat. 474; Treaty of March 28, 1836, with the Ottawas and Chippewas, 7 Stat. 491; Treaty of September 28, 1836, with the Sacs and Foxes, 7 Stat. 517; Treaty of July 29, 1837, with the Chippewas 7 Stat. 536; Treaty of November 1, 1837, with the Winnebagoes 7 Stat. 544; Treaty of October 4, 1842, with the Chippewas, 7 Stat. 591; Treaty of September 15, 1797, with the Senekas, 7 Stat. 601; Treaty of October 13, 1846, with the Winnebagoes 0 Stat. 878; Treaty of September 30, 1854, with the Chippewas, 10 Stat. 1109; Treaty of July 31, 1855, with Ottawas and Chippewas, 11 Stat. 621; Treaty of August 2, 1855, with the Chippewas, 11 Stat. 631; Treaty of June 11, 1855, with Nez Perces, 12 Stat. 957; Treaty of October 7, 1863, with the Tabeguaches, 13 Stat. 673; Treaty of October 21, 1867, with the Klowns and Comanches, 15 Stat. 581; Treaty of October 28, 1867, with the Cheyennes and Arapahoos, 15 Stat. 593; Treaty of April 29, et seq., 1868, with Sioux, 15 Stat. 635; Treaty of May 7, 1868, with the Crows, 15 Stat. 649; Treaty of June 1, 1868, with the Navajos, 15 Stat. 667; Treaty of July 3, 1868, with Shoshones and Bannock tribes, 15 Stat. 673; Treaty of October 14, 1864, with the Yahooskins, 16 Stat. 707. The Treaty of February 7, 1911,

These rights, however, differ in several respects from ordinary property rights, and therefore deserve brief mention in a discussion of the general legal status of Indian tribes.

Indian hunting and fishing rights are, in general, of two sorts, those pertaining to Indian reservation lands and those pertaining to nonreservation (generally ceded) lands.

The extent of Indian rights with respect to reservation lands is noted in an opinion of the Acting Solicitor¹⁷⁴ for the Interior Department, upholding the exclusive right of the Red Lake Chippewa Tribe to fish in the waters of Red Lake, and declaring:

An examination of the various treaties between the United States and the Chippewa Indians discloses that while the right in the Indians to hunt and fish on ceded lands was reserved in some of the earlier treaties (see Article 5, Treaty of July 20, 1837, 7 Stat. 536; Article 2, Treaty of October 4, 1842, 7 Stat. 591; and Article 11, Treaty of September 30, 1854, 10 Stat. 1109), no reservation of the right to hunt and fish was made with respect to the unceded lands of the Red Lake Reservation. But such a reservation was not necessary to preserve the right on the lands reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was "not much less necessary to the existence of the Indians than the atmosphere they breathed" remained in them unless granted away. *United States v. Winans*, 198 U. S. 371. Speaking of a

between the United States and the United Kingdom, 37 Stat. 1538, and the Treaty of July 7, 1911, between the United States and Great Britain, Japan, and Russia, 37 Stat. 1542, restricting pelagic sealing in certain waters, specifically exempt from such restrictions the natives dwelling on the coasts of those waters.

¹⁷² Act of April 29, 1874, 18 Stat. 36 (Ute); Act of May 9, 1924, 43 Stat. 117 (granting to Fort Hall Indians reservation of an easement, in lands sold to United States, to use said lands for grazing, hunting, fishing, and gathering of wood "the same way as obtained prior to this enactment, insofar as such uses shall not interfere with the use of said lands for reservoir purposes"). The Act of June 30, 1864, 13 Stat. 324, authorized the President of the United States to negotiate with the Confederated Indian Tribes of Middle Oregon

for the relinquishment of certain rights guaranteed to them by the first article of the treaty made with them April eighteenth, eighteen hundred and fifty-nine, by which they are permitted to fish, hunt, gather roots and berries, and pasture stock, in common with citizens of the United States, upon the lands and territories of the United States outside their reservations

and appropriated the sum of five thousand dollars to defray the expenses of the treaty and pay the Indians for their relinquishment of such rights.

¹⁷³ See Chapter 15, especially sec. 21.

¹⁷⁴ Op. Acting Sol. I. D., M.28107, June 30, 1936.

similar situation, the Supreme Court of Wisconsin in *State v. Johnson*, 249 N. W. 285, 288, said:

"While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they had theretofore enjoyed, we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them. At the time the treaty of 1854 was entered into there was not a 'shadow of impediment upon the hunting rights of the Indians' on the lands retained by them. 'The treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.' *United States v. Winans*, 198 U. S. 371, 25 S. Ct. 662, 664, 49 L. Ed. 1039. We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued."

The court further recognized that as to unpatented lands inside the reservation, the fish and game laws of the State of Wisconsin were without force and effect.

By tradition and habit the Indians as a race are hunters and fishermen, depending largely upon these pursuits for their livelihood. Their ancient and immemorial right to follow these pursuits on the lands and in the waters of their reservations is universally recognized. The Indians of the Red Lake Reservation appear to have asserted and exercised an exclusive right of fishing in the waters of Upper and Lower Red Lakes from the beginning subject only to Federal control and regulation. The right of the Indians so to do has not heretofore been disputed by the State of Minnesota but has been recognized and acquiesced in. . . . Circumstances somewhat similar to these, coupled with the rule of liberal construction uniformly invoked in determining the rights of Indians, were cited by the Supreme Court of the United States in support of its conclusion that the Metlakatla Indians had an exclusive right to fish in the waters adjacent to Annette Islands in Alaska notwithstanding the fact that the Act of Congress setting aside the Islands as a reservation for the Indians made no mention of the surrounding waters or the fishing rights of the Indians therein. *Alaska Pacific Fisheries v. United States*, 248 U. S. 86. . . .

In *United States v. Sturgeon* (27 Federal Cases, Case No. 16413), the court gave consideration to the rights of the Indians of the Pyramid Lake Indian Reservation in Nevada to fish in the waters of a lake inside the boundaries of their reservation and held:

"The president has set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. The lines of the reservation have been drawn around it for the purpose of excluding white people from fishing there except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law."

In an opinion dated May 14, 1928 (M.24358), the Solicitor for this Department ruled that the State of Washington was without right to regulate or control the use of boats on navigable bodies of water within the Quinalt Indian Reservation in that State. The Solicitor said, and his remarks apply with equal force here:

"Manifestly, unless the Indians of the Quinalt Reservation are protected in the exclusive use and occupancy of their reservation including the waters therein, navigable or nonnavigable, then their rights may become subject to serious interference, if not jeopardy, by outsiders. If we admit the right of the State to invade the reservation for the purpose of regulating or controlling the use of boats on the Quinalt or any other body of navigable water therein. It

would be tantamount to recognizing the right of the State to regulate other activities there, including fishing. This we cannot afford to do."

Minnesota was admitted into the Union in 1858. The Indian title, as subsequently recognized by treaty and Act of Congress, then extended to all of the lands surrounding Upper and Lower Red Lakes. The Indian title was that of occupancy only, the ultimate fee being in the United States, but the right of occupancy extended to and included the right to fish in the waters of the Lakes. *United States v. Winans*, *supra*. These rights insofar as the diminished reservation is concerned have never been surrendered or relinquished by the Indians nor have they been taken away by any Act of Congress of which I am aware. In these circumstances, it is not unreasonable to hold that the State upon its admission into the Union took title to the submerged lands subject to the occupancy rights of the Indians in virtue of which the Indians possess an exclusive right of fishing in the waters of the Lakes. *Beecher v. Wetherby*, *supra*; *United States v. Thomas*, *supra*. If this be the correct view, and I think it is, the exercise by the Indians of the right of fishing is subject to Federal and not State regulation and control. *United States v. Kagama*, 118 U. S. 375; *In re Blackbird*, 109 Fed. 139; *Peters v. Malin*, 111 Fed. 244; *In re Lincoln*, 129 Fed. 246; *United States v. Hamilton*, 233 Fed. 685; *State v. Campbell*, 53 Minn. 354, 55 N. W. 553.

In expressing the foregoing view, I am mindful of the statement of the Supreme Court in *United States v. Holt Bank*, *supra*, that while the Indians of the Red Lake Reservation were to have access to the navigable waters thereof and were to be entitled to use them in accustomed ways, "these were common rights vouchsafed to all, whether Indian or white." But when this statement is read, as it should be, in the light of the decisions cited in its support it becomes apparent that the court had no mind rights of navigation of a public nature and not private rights of ownership such as the Indian right of fishing. The latter right was not involved and was neither considered nor discussed.

Accordingly, since the Indians exclusive rights to fish in the waters of Lower Red Lake and that part of Upper Red Lake inside the Indian reservation is supported by all of the decided cases touching on the subject, it is my opinion that continued administrative recognition of such rights as exclusive in the Indians is fully justified.

Such rights of hunting and fishing as the Indian tribes may enjoy are subject, in the first instance, to federal regulation. Thus it has been held that Congress may restrict tribal rights by conferring on a state powers inconsistent with such rights, through an enabling act.¹⁷⁵

Likewise, the United States may limit Indian hunting and fishing rights by international treaty.¹⁷⁶ The extent and constitutional limits of such regulatory powers of State and Federal Governments are questions more fully considered in other chapters of this volume.¹⁷⁷ Within the limits suggested tribal rights of hunting and fishing have received judicial recognition and protection against state and private interference¹⁷⁸ and even against interference by federal administrative officials.¹⁷⁹

¹⁷⁵ *Ward v. Race Horse*, 163 U. S. 504 (1896). But cf. *Seufert Bros. Co. v. United States*, 249 U. S. 194 (1919).

¹⁷⁶ See Op. Sol. I. D., M.27690, June 15, 1911, 54 I. D. 517 (holding Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, applicable to Winomish Indian Reservation).

¹⁷⁷ See Chapters 5, 6.

¹⁷⁸ *Seufert Bros. Co. v. United States*, 249 U. S. 194 (1919); *United States v. Winans*, 198 U. S. 371. *In re Blackbird*, 109 Fed. 139 (D. C. W. D. Wis. 1901). And see *Halbert v. United States*, 283 U. S. 753, 756 (1931); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 410 (1904); *Spalding v. Chandler*, 160 U. S. 394 (1896); *Taylor v. United States*, 44 F. 2d 531, 532-536 (C. C. A. 9, 1930), cert. den. 283 U. S. 820.

¹⁷⁹ *Mason v. Sams*, 5 F. 2d 255 (D. C. W. D. Wash. 1925), discussed in Chapter 9, sec. 5C.