be distributed only to tribal members. It may thus provide that all children born of a marriage between a white man and an Indian woman who was recognized by the tribe at the time of her death shall have the same rights and privileges to the property of the tribe to which the mother belonged as have members of the tribe.

Congress may authorize an administrative body to make a roll descriptive of the persons thereon so that they might be identified, to take a census of the tribes and to adopt any other means deemed necessary by the commission. It may provide that such rolls, when approved by the Secretary, shall be final, and that persons thereon and their descendants born thereafter and such persons as intermarry according to tribal laws should alone constitute the several tribes they represent.

Enrollment does not ordinarily give a vested right in tribal property. Congress may disregard the existing membership rolls of a tribe and direct that the per capita distribution be made upon the basis of a new roll, even though such act may be inconsistent with prior legislation, treaties, or agreements with the tribe. Thus, the Supreme Court in the case of *Sixemore v. Brady* said:

> * * * Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it seemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government. * * * (P. 447.)

The Supreme Court, in holding that Congress may add to a tribal roll even though it purports to be final, said:

> It is not proposed to disturb the individual allotments made to members living September 1, 1902, and enrolled under the act of 1902, and therefore we are only concerned with whether children born after September 1, 1902, and living on March 4, 1906, should be excluded from the allotment and distribution. The act of 1902 required that they be excluded, and the legislation in 1906, as we have seen, provides for their inclusion. It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contentions is that it treats the act of 1902 in two ways, when "it is only an act of Congress and can have no greater effect." Cherokee Intermarriage Cases, 203 U. S. 76, 93. It was but an execution of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation v. Hitchcock*, 197 U. S. 294; *Wallace v. Adams*, 204 U. S. 418, 425. It is not to be overlooked that those for whose credit the act was made in 1906 were not strangers to the tribe, but were children born into it while it was still in existence and while there was still tribal property whereby they could be put on an equal, or approximately equal, plane with other members. The council of the tribe asked that this be done, and we entertain no doubt that Congress in according to the request was well within its power. (P. 447-468.)

In the important case of *Wallace v. Adams* the Supreme Court held that the Act of July 1, 1902, creating the Choctaw-Chickasaw citizenship court and giving it power to examine the judgments of the Indian territorial courts and determine whether they should be annulled on account of irregularities, was a valid exercise of power. This and other cases in this field are based on the theory of the ultimate power of Congress over matters of membership of the tribes and its power to adopt any reasonable measures to ascertain who are entitled to its prerogatives. If the result of one of the methods which it adopts is unsatisfactory, it may try another. Congress may make the finding of an administrative commission, approved by the Secretary of the Interior, a final determination of tribal membership. The Supreme Court in the case of *United States v. Wildcat* said:

> * * * There was thus constituted a quasi-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the elegibilities of this division should be ascertained. To permit the Commission established and endowed with authority to hear and determine the matter.

A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain.

When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the judgment upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

We cannot agree that the case is within the principles decided in *Scott v. McNeal*, 154 U. S. 34, and that

---

120204 U. S. 415 (1907).
132 Stat. 643, 647.
133 See *Stephens v. Cherokee Nation*, 174 U. S. 445 (1899), and *Wallace v. Adams*, 204 U. S. 418 (1907). Also see Chapter 19, sec. 4.
135 244 U. S. 111 (1917).
By necessity Congress has delegated much of its power over the Indians to administrative officials. This power is dependent upon and supplemental to the legislative power. Although rhetorical figures of speech, like "guardianship," may tend to blur the distinction between administrative and legislative powers, it is important to distinguish between the problem of whether Congress possesses the authority to pass certain legislation and the problem of whether Congress has vested its power in an administrative officer or department.

"We have no officers in this government," the Supreme Court said, in the case of The Floyd Acceptances, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (P. 676-677.)

Therefore, in seeking to trace the scope of administrative power in the field of Indian law, our primary concern must be with the statutes and treaties that confer such power.

The interplay of the legislative and administrative branches of government in Indian affairs has caused the frequent application of two rules of administrative law. The first is that if properly promulgated pursuant to law the rules and regulations of an administrative body have the force and effect of statutes and the courts will take judicial notice of them.127 The Supreme Court in Maryland Casualty Co. v. United States,128 said:

** It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.


SECTION 8. THE RANGE OF ADMINISTRATIVE POWERS

The specific functions of officials of the Indian Service and of other federal officials dealing with Indian affairs are necessarily discussed in various parts of this chapter and in other chapters.129 It may be worth while, however, at this point, to indicate the scheme of authorities which Congress has conferred in this field.

** We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. ** (P. 118-119.)

* * * The second principle is that courts and administrative authorities give great weight to a construction of a statute consistently given by an executive department charged with its administration,130 especially if it is a rule affecting considerable property or a doubtful question.131

The Supreme Court has given great weight to an administrative interpretation even if not long continued.132 These rules are based on the theory that the failure of Congress by subsequent legislation to change the construction of administrative bodies charged with the administration of a statute constitutes acquiescence in the practical construction of a statute.


When the law has been so construed by Government Departments during a long period as to permit a certain course of action, and Congress has not seen fit to intervene, the interpretation so given is strongly persuasive of the existence of the power. (34 Op. A. G. 300 (1924).)

The Supreme Court in Oram v. United States, 261 U. S. 219 (1923), said:

That such individual occupancy [by a non-reservation Indian] is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight [citing cases]. (P. 227.)

A recent administrative interpretation will sometimes be given weight, though conflicting with early interpretation. United States v. Reynolds, 250 U. S. 8, 164, 169 (1919). Departmental sponsorship of legislation is also considered. The Supreme Court in Blaisdell v. Cardin, 236 U. S. 319 (1912), said:

** And there can be no doubt that the act was, the suggestion of the Interior Department, and its construction is such as to assist and not defeat the legislative purpose of the act. Blaisdell v. Cardin, 236 U. S. 319 (1912); Zura v. Priehoda, 223 U. S. 200; United States v. Florida, 223 U. S. 377; and the regulations of the Department are administrative of the act and partake of its legal force. (P. 228.)

In general, administrative powers in the field of Indian affairs have been conferred upon the President, the Secretary of the Interior, and the Commissioner of Indian Affairs. Administrative powers of the President include the consolidation of agencies, and, with the consent of the tribes, the consolidation of one or more tribes on reservations created by Executive order;133 dispensing with unnecessary agents,134 or transferring

129 See especially Chapter 2. Chapters 9 to 11 deal largely with administrative powers over property. Chapter 12 discusses administrative duties regarding federal services for the Indians: Chapter 16 deals with licensing of traders: Chapter 17, sec. 5. covers administration of liquor laws.


members of the Indian Arts and Crafts Board, and the appointment of various Indian Bureau employees.

Other duties are expressly delegated to the Commissioner of Indian Affairs, such as issuing trader's licenses and publishing statutory provisions regulating the duties of Indian Bureau employees.

Provisions in many statutes and occasional treaties confer on the President or the Secretary of the Interior or the Commissioner of Indian Affairs or all three power to make rules and regulations. The wide range of regulations concerning Indians is shown by title 25 of the Code of Federal Regulations. Important statutes, providing for rule-making in relation to the Indian which are included in title 25 of the United States Code are discussed in various parts of this volume. A brief description of the subject matter of some of them will therefore suffice to show the variety of statutes expressly conferring regulatory power on the Secretary of the Interior. He is authorized to make regulations governing the business of the Indian Arts and Crafts Board, concerning the operation of various types of leases affecting restricted Indian lands, concerning service fees from individual Indians, to secure attendance at school, to admit white children to Indian day schools, and to employ on reservations and controlled by the

Administrative powers of the Secretary of the Interior include the establishing of superintendencies, agencies, and subagencies by tribes or by geographical boundaries, the appointment of

The Indian Bureau is also authorized to issue orders for the purchase of goods for Indians and the Indians have been described by a

The Indians were practically

During earlier times the Indians were practically

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a

The President has been described by a
schools and Indian boarding schools, "for the conduct of an Indian reform school," for disposal by will of restricted allotments, "governing the use of water on irrigation lands" and the apportionment of irrigation costs, and covering trading licenses.

In addition to those statutes which confer regulatory power for specific purposes, there are several general statutes which have sometimes been relied upon as the basis for the exercise of administrative power. Section 17 of the Act of June 30, 1834, provides:

- the President of the United States shall be, and he is hereby, authorized to prescribe such rules and regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs, and for the settlement of the accounts of the Indian department.

This general statute fills the needs of practical administration arising from the fact that many acts of Congress require the issuance of regulations for their proper interpretation and enforcement, although such regulations are not expressly authorized.

Section 1 of the Act of July 9, 1832, as amended by the Act of March 3, 1849, establishing the Department of the Interior, provides that a Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and "agreeably to such regulations prescribed by the President, the limits of which have been questioned in several cases. The Supreme Court held ineffectual the restrictive clause because the 'President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed.' (P. 242.)

The question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court in the case of Jones v. Meacham. One of the questions presented by that case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior. In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department.

In Romero v. United States, a regulation of the President regarding the salaries of Indian Service officials was held invalid despite the claim that this might be justified under Revised Statutes.

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

1. The conduct of Indian reform schools.
2. The disposal by will of restricted allotments.
3. The governing of the use of water on irrigation lands.
4. The apportionment of irrigation costs.
5. Covering trading licenses.
6. Issuance of regulations for their proper interpretation and enforcement.
7. The settlement of the accounts of the Indian department.

The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United States and the Indian tribes, which relations are commonly established either by treaty or by statute.

Whether the President, the Secretary of the Interior, or the Commissioner of Indian Affairs has "general supervisory authority" over Indians in the absence of specific legislation has been questioned in several cases.

In the case of Francis v. Francis, the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the President had no authority, in virtue of his office, to impose such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. (P. 242.)

In Jones v. Meacham, the question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court. The case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior.

In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department.

In Romero v. United States, a regulation of the President regarding the salaries of Indian Service officials was held invalid despite the claim that this might be justified under Revised Statutes.

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

1. The conduct of Indian reform schools.
2. The disposal by will of restricted allotments.
3. The governing of the use of water on irrigation lands.
4. The apportionment of irrigation costs.
5. Covering trading licenses.
6. Issuance of regulations for their proper interpretation and enforcement.
7. The settlement of the accounts of the Indian department.

The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United States and the Indian tribes, which relations are commonly established either by treaty or by statute.

Whether the President, the Secretary of the Interior, or the Commissioner of Indian Affairs has "general supervisory authority" over Indians in the absence of specific legislation has been questioned in several cases.

In the case of Francis v. Francis, the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the President had no authority, in virtue of his office, to impose such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. (P. 242.)

In Jones v. Meacham, the question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court. The case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior.

In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department.

In Romero v. United States, a regulation of the President regarding the salaries of Indian Service officials was held invalid despite the claim that this might be justified under Revised Statutes.

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

1. The conduct of Indian reform schools.
2. The disposal by will of restricted allotments.
3. The governing of the use of water on irrigation lands.
4. The apportionment of irrigation costs.
5. Covering trading licenses.
6. Issuance of regulations for their proper interpretation and enforcement.
7. The settlement of the accounts of the Indian department.

The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United States and the Indian tribes, which relations are commonly established either by treaty or by statute.

Whether the President, the Secretary of the Interior, or the Commissioner of Indian Affairs has "general supervisory authority" over Indians in the absence of specific legislation has been questioned in several cases.

In the case of Francis v. Francis, the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the President had no authority, in virtue of his office, to impose such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. (P. 242.)

In Jones v. Meacham, the question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court. The case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior.

In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department.

In Romero v. United States, a regulation of the President regarding the salaries of Indian Service officials was held invalid despite the claim that this might be justified under Revised Statutes.

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

1. The conduct of Indian reform schools.
2. The disposal by will of restricted allotments.
3. The governing of the use of water on irrigation lands.
4. The apportionment of irrigation costs.
5. Covering trading licenses.
6. Issuance of regulations for their proper interpretation and enforcement.
7. The settlement of the accounts of the Indian department.

The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United States and the Indian tribes, which relations are commonly established either by treaty or by statute.

Whether the President, the Secretary of the Interior, or the Commissioner of Indian Affairs has "general supervisory authority" over Indians in the absence of specific legislation has been questioned in several cases.

In the case of Francis v. Francis, the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the President had no authority, in virtue of his office, to impose such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. (P. 242.)
In the case of Levey v. United States, the claim of the Department that Revised Statutes 441 and 463 were a grant of general regulatory powers was again rejected. In this case, as in the Romero case, it may be argued that the regulation in question was in derogation of the statutory rights of the Indians. A fair reading of the opinion, however, indicates that the supposed statutory rights invaded were so tenuous that every unauthorized regulation of the conduct of an Indian, or any other citizen, could similarly be regarded as a violation of statutory or constitutional rights. The real force of the decision is the holding that sections 441 and 463 of the Revised Statutes do not create independent powers.

The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision.

There is sometimes a tendency to regard the scope of administrative authority over Indians as broad enough to encompass almost every form of regulation. This idea, like the view of an omnipotent congressional power, has been nurtured by descriptions of the extent of this power in dicta in decisions involving a specific legislative grant of administrative power.

Such language may influence later decisions in doubtful cases involving questions as to whether administrative power was implicit though not clearly delegated by the language of the statute.

The scope of administrative powers raises problems of particular importance in five fields: (a) tribal lands; (b) tribal funds; (c) individual lands; (d) individual funds; and (e) tribal membership.

Every action which may properly constitute an aid to the enforcement of the law. (P. 297.)

In upholding the power of the Commissioner of Indian Affairs to require bill collectors to remain away from the Indian agency on the days when payments were being made, M. R. Justice Van Devanter, then on the Circuit Court of Appeals, wrote in Rainbow v. Young, 181 Fed. 835 (C. C. A. 8, 1908):

- We turn to the statutes bearing upon the authority of the Commissioner of Indian Affairs, and in considering them it is well to remember, as was said in United States v. Macomb, 7 Pet. 1, 14, 8 L. Ed. 597, that:

  A practical knowledge of the action of any one of the great departments of the government must convince every officer that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion as to what is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would involve a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are countless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. (P. 837.)

- In our opinion the very general language of the statute makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the superintendence of the President and the Secretary of the Interior, to make all Indian affairs and matters arising out of Indian relations, with a just regard, not merely to the interests of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them, by reason of their state of dependency and tutelage. And, while there is no specific provision relating to the exclusion of collectors from Indian agencies at times when payments are being made to the Indians, it does not follow that the commissioner is without authority to exclude them, for by section 2419 he is both authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation "any person" whose presence therein may, in his judgment, be detrimental to the peace and welfare of the Indians. This applies alike to all persons whose presence may be thus detrimental, and who commits the commission of an offense within the reservation.

- It is, of course, necessary to the adequate protection of the Indians and to the orderly conduct of reservation affairs that some such authority should be vested in the Commissioner, to be exercised in such a manner as not to deprive the Indians, with their consent, of the possession of lands not within the reservation.

- The claim of administrative officers to plenary power to regulate Indian conduct is thus rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision.

**SECTION 9. ADMINISTRATIVE POWER—TRIBAL LANDS**

**A. ACQUISITION**

One of the most important powers granted to the Secretary of the Interior is the power to acquire land for tribes. Apart from the many special statutes in this field, two provisions of general law deserve mention.
of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project hereof authorized in any Indian reservation.

This provision was originally framed in mandatory language, but was amended to make the restoration a discretionary act. The administrative determination of this question may be guided by the fact, among others, that the protection of the property rights of the tribes is a federal function in which the public at large is interested.

A second method by which the Secretary of the Interior is authorized to acquire lands for Indian tribes is set forth in section 5 of the Wheeler-Howard Act. This section authorizes the Secretary:

- In his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface right to lands, within or without existing reservations, including trust and otherwise restricted allotments, for Indians being living or deceased, for the purpose of providing land for Indians.

The procedure followed under this authority and the status of lands thereby acquired are elsewhere discussed.

B. LEASING

The Secretary of the Interior has no power to enter into or approve a lease without authority from either a treaty or a statute. A few statutes permit the Secretary alone to make tribal leases for land rights, but the law covering the leasing of most tribal land permits the tribal council to lease the lands subject to the approval of the Secretary. Some of these statutes have been recently summarized by the Solicitor of the Department of the Interior.

Under existing laws, and under the Wheeler-Howard Act, the tribal council has a right to make leases and permits on its own initiative subject to the approval of the Department.

Under most of the statutes it is held that the Secretary acts in a quasi-judicial capacity in acting upon the recommendations of the superintendent and the actions of the tribal council regarding these leases, and hence cannot delegate this function to the superintendent.

C. ALIENATION

The general prohibition against alienation of tribal lands is elsewhere analyzed. These restraints upon alienation apply to federal administrative officers, as well as to tribal authorities, and to interests less than a fee as well as to conveyances in fee simple. Thus, in the absence of express statutory authorization, the Secretary of the Interior has no power to diminish the tribal estate by withdrawing a right-of-way for the construction of irrigation ditches. Congress, however, has conferred upon administrative authorities various statutory powers to alienate interests in tribal land less than a fee, particularly easements and rights-of-way. Generally these statutes do not make tribal consent a condition to the validity of the alienation, but as a practical administrative matter tribal consent is frequently made a condition of the grant.

104 THE SCOPE OF FEDERAL POWER OVER INDIAN AFFAIRS
where the Secretary of the Interior seeks to set aside tribal lands for reservoir purposes for an irrigation project.

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

**SECTION 10. ADMINISTRATIVE POWER—TRIBAL FUNDS**

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

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

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

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

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

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

**211** The Act of April 1, 1880, c. 41. 21 Stat. 70, provided:

That the Secretary of the Interior may, and he is hereby, authorized to deposit in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian Trust funds.


**213** See 25 C. F. R. 256.83.

**214** See Chapter 13, secs. 23 and 24.

**215** See Chapter 15, secs. 23 and 24.

**216** See Chapter 15, sec. 23.

**217** Ibid.

**218** See Chapter 15, secs. 23 and 24.

**219** See Chapter 15, sec. 23.

**220** See Chapter 15, sec. 23.

**221** See Chapter 15, sec. 23.

**222** The Act of May 18, 1916, sec. 27, 39 Stat. 123, 158, 159, requires specific congressional appropriation for expenditure of tribal funds except as follows:

- **223** Equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are hereby continued.

- **224** See Chapter 15, sec. 23. Provisions relating to the deposit or investment of funds are numerous. For example, the Secretary of the Interior is authorized "to invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties, or the deposits made therefor, or any money or interest upon the proceeds of the lands sold by them; and he shall make no investment of such moneys, or of any portion, at a lower rate
Among the most important of the permanent authorizations for the disbursement of tribal funds are the various statutes providing for the division and apportionment of tribal funds among the members of the tribe. 219

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

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

- The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined. The contention, however, that the Secretary of the Interior could legally make only such disbursements as were expressly authorized by Congress cannot be conceded. The authorities cited in plaintiff's brief in support of this contention, when considered in the light of the precise questions presented, do not sustain it. The opinion of Attorney General Mitchell of October 5, 1929 (30 O. P. A. 698-100), in fact, refutes the contention, and in effect lays down the rule that the authority of the Secretary of the Interior over Indian property may arise from the necessary implication as well as from the express provisions of a statute. We think this is the correct rule and will apply it in determining whether the Secretary of the Interior was authorized to make the payments in question. The authority of the Secretary of the Interior to make the payments, or his lack of authority to make them, must be found in the treaties between the United States and the Creek Nation, and the various acts of Congress dealing with Creek tribal affairs. (P. 485.)

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

Perhaps the most important of these statutory limitations in effect today is that imposed by section 15 of the Act of June 16, 1904, which gives an organized tribe the right to prevent any disposition of its assets without the consent of the proper officers of the tribe. This includes the right to prevent disbursements of tribal funds by department officials, where the tribe has not consented to such disbursements. Unless an act of Congress authorizing disbursements of tribal funds expressly repeals relevant provisions of the Indian Reorganization Act, such appropriation legislation does not nullify the power of the tribe to prevent such expenditure. 224

There is a fourth category of funds which may be called "tribal funds" but which are subject neither to the uncontrollable tribal power pertaining to the first class of funds discussed; to the defined tribal power of the second class nor to the detailed congressional control pertaining to the third class. This fourth category includes funds which are dedicated to administrative officials as a result of various Indian activities not specially recognized or regulated by act of Congress. The Act of March 3, 1880, 225 as amended, provides:

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

The Comptroller General in a report on Indian funds dated February 28, 1929, 226 stated:

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

219 See Chapter 9, sec. 6; Chapter 10, sec. 5.
220 Act of May 18, 1916, sec. 27, 39 Stat. 123, 158, requires with a few exceptions specific congressional authorization for tribal expenditures of tribal moneys. The Act of May 25, 1918, secs. 27 and 28, 40 Stat. 561, authorizes the Secretary to invest restricted funds, tribal or individual, in United States bonds, 1910, 25 Stat. 1261. 221 78 C. Cis. 474 (1933). On the lack of power of the Secretary to restore to the Creek orphan fund the funds erroneously expended for general benefit of tribe, see 16 O. P. A. 31 (1918).
222 These statutes are discussed in Chapter 9, sec. 6; Chapter 10, sec. 5.
223 Act of May 15, 1916, sec. 27, 39 Stat. 123, 158, requires with a few exceptions specific congressional authorization for tribal expenditures of tribal moneys. The Act of May 25, 1918, secs. 27 and 28, 40 Stat. 561, authorizes the Secretary to invest restricted funds, tribal or individual, in United States bonds, 1910, 25 Stat. 1261. 224 78 C. Cis. 474 (1933). On the lack of power of the Secretary to restore to the Creek orphan fund the funds erroneously expended for general benefit of tribe, see 16 O. P. A. 31 (1918).
226 48 Stat. 984.
Administrative power over individual Indian lands is of particular importance at five points:

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

A. APPROVAL OF ALLOTMENTS

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

"... The Secretary may for good reason refuse to approve an allotment selection, but he may not cancel his approval of an allotment except to correct error or to relieve fraud. Cf. Cong. Rec. 79th, 1st Sess. 459 (public land entry). It is very doubtful whether the Secretary would be privileged to return allotment selections to tribal ownership simply on the ground that the Wheeler-Howard Act possibly forbids the trust patenting of such selections.

(2) Where the Secretary has approved an allotment the ministerial duty arises to issue a patent. With approval his discretion is ended except, of course, for such reconsideration of his approval as he may find necessary (24 L. D. 264). Since only the routine matter of issuing a patent remains, the allottee after his allotment is approved is considered as having a vested right to the allotment as against the Government. Raymond Bear Hill (42 L. D. 689 (1929)). Cf. Where a certificate of approval has issued as in the Five Civilized Tribe cases, Bollinger v. Frost (216 U. S. 240); and where right to a homestead is involved, Stark v. Starke (6 W. All. 402). And then the allottee may bring suit for the patent. See Teague v. Nickols-Chilumumber Co. (126 Minn. 380, 148 N. W. 288, 290 (1914)); Of Lane v. Hopland (244 U. S. 174); Butterworth v. United States (112 U. S. 50); Barney v. Dolph (97 U. S. 652, 656).

(3) Where an allotment has not been approved, on the other hand, approval and the issuance of a patent cannot be compelled by mandamus. West v. Hitchcock (205 U. S. 89); United States v. Hitchcock (190 U. S. 316). But it is recognized that an allottee acquires rights in land with some of the incidents of ownership when the allotting agents have set apart allotments and he has made his selection. Until that time an Indian eligible for allotment has only a floating right which is personal to himself and dies with him. La Roque v. United States (239 U. S. 62); St. Elmo Smith (140 D. 323, 327). The owner of an allotment selection, even before its approval, has an inchoate equitable interest (United States v. Chase (245 U. S. 89); Smith v. Bonifer (166 Fed. 846) (C. C. A. 9th, 1909)); which will be protected from the outside world (Smith v. Bonifer, supra); and which he can transfer within limits (Henkel v. United States, supra; United States v. Chase, supra); and which is sufficient to confer on him the privileges of State citizenship as granted to all "allottees" by the act of 1887 (State v. Norris, supra). Moreover, where the Government has issued an erroneous patent for the allotment selections, the owner of such selection will be protected in his right against the adverse interests possessing the patent (Hy-Yu-Tse-Pi-Hi-Kin v. Smith (194 U. S. 401); Smith v. Bonifer (192 Fed. 888) (C. C. A. 9th, 1909)); and against the Government itself. Conaway v.
instructions and in accordance with a course of allotment on the reservation, in my opinion it is probable that a court would hold that the Secretary cannot decline to approve particular selections because of a subsequent change in land policy. His authority to disapprove such selections would be limited to disapproving particular selections not entitled to approval because of error or the ineligible or the applicant or other such reason. I base my opinion on the fact that when an official allotment selection has been duly made in accordance with the laws and regulations at the time of the selection, in ordinary circumstances the selector acquires a certain property interest in the land and a right to the perfection of his title which courts will protect.

An Indian eligible for allotment who has not properly selected an allotment under the instructions of the Interior Department has only a floating right to an allotment which is inchoative and which gives him no vested interest in any land. La Roque v. United States, 239 U. S. 62; Woodbury v. United States, 257 Fed. 302, C. C. A. 8th, 1909. After proper selection of an allotment, however, an Indian has been held to have an individual interest in the land with many of the incidents of individual ownership. His interest is inheritable, transferable within limits, and deserving of protection against adverse claims by third persons. United States v. Chase, 245 U. S. 89; Henkel v. United States, 257 U. S. 43; Hy-Yu-Tac-Mii-Kin v. Smith, 174 U. S. 401; Bonneville, 106 Fed. 846, C. C. A. 8th, 1909; see 55 L. D. 295, at 303.

The cases before the Interior Department and before the courts which are of most concern in this problem are the cases dealing with the protection of allotment selections against adverse action by the Government, either by Congress or by the Executive. The Department has taken the view that acts of Congress limiting allotment rights in "undisposed of" tribal lands do not apply to allotment selections even though they have not been approved. Fort Peck and Uncompahgre Allotments, 55 I. D. 295, Raymond Bear Hill, 52 L. D. 689. In these decisions it was held that the filing and recording of an allotment selection segregates the land from other disposal, withdraws the land from the mass of tribal lands, and creates in the Indian an individual property right.

** * * * * *

a judicial determination of whether or not an allotment selection merits protection against adverse governmental action involves a weighing of the equities in the light of the intent of Congress and the history of administration concerning allotments. In the Farmers State cases the act contemplated that no allotments should be made until the Secretary of the Interior was satisfied of their advisability. No allotments were in fact made and the Secretary was clearly not satisfied of their advisability. If a court attempted to enforce the recognition and completion of tentative selections in the field, it would encroach upon executive discretion. In the Payne and Leery cases, however, whatever discretion had been given to the Executive as to the advisability of allotments had been exercised and a course of allotment had been established. Thereafter, individual allotment selections were approved or disapproved according to their individual merits. In this situation a court could properly prevent, as an abuse of discretion, the failure to approve an individual allotment selection, not because of its own merits, but because of extraneous policies.

### B. RELEASE OF RESTRICTIONS

Perhaps the most important power vested in administrative officials with respect to allotted lands is the power to pass upon the alienation of such lands. We have elsewhere noted the rigid restrictions placed upon the alienation of tribal lands from early times. Allotments carried the obvious risk that the land given to the individual allottee would be speedily alienated. According restrictions of various kinds were imposed upon allotments For the purpose of controlling alienation. Such restrictions were

---

239 See Chapter 13, sec. 18.
240 See Chapter 11, sec. 1.