BEFORE THE INDIAN CLAIMS COMMISSION

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, suing on behalf of the Western Shoshone Nation of Indians, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 326-A
MESCALERO APACHE TRIBE, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 22-G

Decided: October 4, 1973

Appearances:

Pierre J. LaForce, Charles A. Hobbs, and Frances L. Horn, Attorneys for Plaintiff in Docket No. 326-A. Wilkinson, Cragun and Barker were on the Briefs.

Richmond F. Allan and Ruth H. Duhl, Attorneys for Plaintiffs in Docket No. 22-G. Weissbrodt & Weissbrodt were on the Briefs.

Gordon W. Daiger, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION

Blue, Commissioner, delivered the opinion of the Commission.

INTRODUCTORY STATEMENT

The accounting reports filed in these cases show that the defendant has kept substantial amounts of each plaintiff's money in a non-interest-bearing account in the Treasury of the United States during the period between 1883 and 1930. The account is known as Indian Moneys, Proceeds of Labor. We describe it in detail later in this opinion.

The plaintiffs contend that the defendant was required to invest this fund, and its accumulated interest, at the best interest rate attainable or to pay the highest statutory rate for treasury deposits, whichever would provide the greater return, and that it is liable to them for its failure to do so.

We reserved ruling on this contention in our 1970 opinions in these dockets, directing the parties to fully research the pertinent statutes and historical materials. Te-Moak Bands of Western Shoshone Indians v. United States, Docket 326, 23 Ind. Cl. Comm. 70, 79 (1970); Mescalero Apache Tribe, Docket No. 22-G, 23 Ind. Cl. Comm. 181, 186 (1970).

Pooling their resources, attorneys for the plaintiffs, on June 1, 1971, filed an elaborate brief on the defendant's obligations to make all Indian trust funds productive, accompanying it with two volumes of legal and historical records. The defendant answered on September 13, 1972, with an equally elaborate brief, accompanied by similarly voluminous records. A short reply was filed by the plaintiffs. Oral argument was held before the Commission on December 4, 1972. The briefs and argument in Dockets 326 and 22-G have been adopted by reference in nine other accounting cases.[1/] The latter cases involve several other unproductive funds in addition to Indian Moneys, Proceeds of Labor.

The Commission is now ready to decide. The extraordinarily thorough work of the lawyers on both sides has greatly helped us to reach our present decision.

The purpose of this opinion is to decide the questions now before us. While we hope the history of the development of Indian trust law herein may prove useful elsewhere, our rulings in the case of each plaintiff who adopted the Te-Moak-Mescalero briefing will be made by separate order, accompanied wherever necessary by a separate opinion.

1/ San Carlos Apache Tribe of Arizona, the White Mountain Apache Tribe of the Fort Apache Reservation, et al., Docket 22-H; Northern Paiute Nation, et al., Docket 87-A; Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Docket 100-B; Fort Peck Indians of the Fort Peck Reservation, Montana, Docket 184; Blackfeet and Gros Ventre Tribes of the Blackfeet Reservation, Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, Dockets 279-C and 250-A; Confederated Tribes of the Goshute Reservation, Docket 326-B; Shoshone-Bannock Tribes of the Fort Hall Reservation, Docket 326-C; Three Affiliated Tribes of the Fort Berthold Reservation, Docket 350-G.

We start with the proposition that the duties of the United States with respect to the Indian tribes' moneys must be based on written law: the Constitution, treaties, and acts of Congress. We look, of course, to the legal tradition in which the draftsmen of our written law were trained, the common law and equity jurisprudence, for the implications of their words.[2/] But the search for rules governing the administration of Indian trust funds begins as a search of the Statutes at Large.

The ensuing discussion is in chronological order, since Indian trust law developed as a by-product of history rather than according to plan.

I. 1797 TO 1837: THE BEGINNING OF THE INDIAN TRUST FUNDS

The earliest Indian trust fund of the United States appears to be the one set up in 1797 by Robert Morris for the Seneca Nation. In consideration of the Senecas' grant of four million acres in western New York, Morris agreed to invest $100,000 in stock of the Bank of the

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2/ Smith v. Alabama, 124 U. S. 465, 478-479 (1888); Rice v. Minnesota & Northwestern Railroad Co., 60 U. S. (1 Black) 358, 374-375 (1862). See also United States v. Wong Kim Ark, 169 U. S. 649, 654 (1898). For the application of equity to the interpretation of the Government's treaty and statutory obligations, see Seminole Nation v. United States, 316 U. S. 286, 295-297 (1942); City of Lincoln v. Ricketts, 84 F. 2d 795, 797 (7th Cir. 1936); Indian Claims Commission Act, § 2(1), 25 U. S. C. § 70a(1) (1970).

United States to be "held in the name of the President of the United States, for the use and behoof of the said nation of Indians." The Government approved Morris's contract with the Senecas and assumed administration of the trust.3/

In numerous treaties of the late eighteenth and early nineteenth centuries, the United States agreed to pay annuities to the Indians, either perpetually or for a term.4/ But these were direct payments out of the treasury in fixed dollar amounts and did not represent interest on any principal fund set aside for the Indians.5/

Another early Indian trust fund was established by the treaty of February 27, 1819, between the United States and the Cherokee Nation,

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3/ Contract of September 15, 1797, 7 Stat. 601. See also Seneca Nation v. United States, 173 Ct. Cl. 917 (1965), rev'g Docket 324-A et al., 12 Ind. Cl. Comm. 755 (1963); subsequent proceedings, 28 Ind. Cl. Comm. 12 (1972).

4/ A list of the annuities due from the United States to various tribes, with reference to the treaties and statutes authorizing them, appears in the report of the Commissioner of Indian Affairs of November 25, 1852, at 308-313 (item D-80 in the Appendix to the Defendant's Memorandum on the Status of Indian Trust Funds and the Tribes' Rights to Interest on Particular Funds, filed September 13, 1972).

Hereinafter exhibits reproduced in said appendix will be cited as "D-1," "D-2," etc. The plaintiffs designated their compilation of historical exhibits as Appendix B; and items reproduced therein will be cited hereinafter as "B-1," "B-2," etc.

5/ The distinction between trust funds and annuities is well illustrated in the Senate debate of 1831 on a bill to provide for the payment of $6,000 annually to the Seneca Indians in lieu of the actual yield on their $100,000 trust fund, which varied with prevailing interest rates. See 7 Register of Debates in Congress 29-30, 78-85 (1831). The bill was approved, and the Seneca trust fund was commuted to an annuity. Act of February 19, 1831, c. 26, 4 Stat. 442.

7 Stat. 195. Here, the Government agreed to sell certain ceded lands and invest the proceeds to provide income for the support of education among the Cherokees A similar educational fund, financed from ceded lands, was established for the Kansas Indians under the Treaty of June 3, 1825, 7 Stat. 244. The Cherokee fund was to be invested, under the direction of the President, in "stock of the United States, or such other stock as he may deem most advantageous to the Cherokee nation."6/ The Kansas treaty does not even mention investment of the educational fund; but in fact it was invested, in state bonds.7/

Three treaties made in 1831 appear to be the earliest in which the United States agreed to pay interest itself on the proceeds of ceded Indian lands, rather than to invest them.8/ Five percent was the stipulated rate. This appears to be the first mention in an Indian treaty of 5 percent, which later became the prevailing interest rate on Indian trust funds.

6/ The word "stock" frequently meant bonds in the nineteenth century, and appears to have been construed exclusively in this sense where used in the treaties and statutes reviewed in this opinion. Cf. Peoria Tribe v. United States, 390 U.S. 468, 470 (1968).

7/ S. Doc. 426, 25th Cong., 2d Sess. 6 (1838--D-17).

8/ Treaties of February 28, 1831, with Senecas of Sandusky, 7 Stat. 348; of July 30, 1831, with Senecas and Shawnees residing at and around Lewistown, 7 Stat. 351; and of August 8, 1831, with Shawnees residing at Wapaghkonnetta and Hog Creek, 7 Stat. 355.

Despite the treaty language requiring the United States itself to pay the interest on the 1831 funds, Congress decided that these funds should be invested. The fourth section of the Act of June 14, 1836, c. 88, 5 Stat. 36, 47, directed the Secretary of War to invest "in a manner which shall be, in his judgment, most safe and beneficial for the fund," with a proviso that he should make no investment at a lower rate than five percent.

Investment meant actually buying bonds, usually through a stockbroker, storing the certificates in an iron safe in the office of the Commissioner of Indian Affairs, and clipping and presenting the coupons for payment when interest became due.[9/] Depositing the funds in the U. S. Treasury, with the Government paying interest on them, was not considered investment, but as something done in lieu of investment.[10/]

9/ See Select Committee to Inquire into and Report the Facts in Relation to the Fraudulent Abstraction of Certain Bonds, Held by the Government in Trust for the Indian Tribes, from the Department of the Interior, Abstracted Indian Trust Bonds, H. R. Rep. No. 78, 36th Cong., 2d Sess. (Serial 1107, 1861), especially testimony of Secretary of the Interior Jacob Thompson at 27-45, former Commissioner of Indian Affairs Luke Lea at 46, and Mr. J. A. Williamson at 237. See also "General Remarks" at pages 6-7 of S. Doc. 426, 25th Cong., 2d Sess. (1838--D-17).

10/ See Reports of Commissioner of Indian Affairs, for 1840 at 278 (D-41), for 1842 at 396 (D-48), for 1852 at 306 (D-80), for 1874 at 465 (D-83), for 1875 at 151 (D-84), for 1876 at 263 (D-85), for 1879 at 310 (D-86), for 1905 at 483-84 (D-87), for 1906 at 448-49 (D-90), and for 1909 at 150 (D-91).

It is therefore inaccurate to state that the Act of June 14, 1836, or similar legislation, required the Government to "pay" interest to the Indians. The Government as trustee was required to buy securities bearing 5 percent or higher interest; but the issuers of the securities were to provide the interest.

The 1836 legislation was doubtless influenced by the contemporary happy position of the treasury. The public debt had been extinguished in 1835, except for $328,582.10 which remained outstanding solely because the creditors had not come forward to receive payment. A surplus of at least $14,000,000 was anticipated in the treasury at the end of 1836. By the Act of June 23, 1836, c. 115, sec. 13, 5 Stat. 55, Congress provided that any such surplus over $5,000,000 should be distributed to the States of the Union. The estimate proved low, and $28,101,644.94 were actually distributed. See R. Bayley, The National Loans of the United States, 67 (2d ed., 1882) (D-5).

Under such circumstances it would have made little sense for the United States to pay interest to the Indians in order to keep funds it did not need.

II. 1837 TO 1841: THE DEBACLE OF THE STATE BONDS

By the fourth section of the Act of January 9, 1837, c. 1, 5 Stat. 135, Congress extended the investment provisions of the Act of June 14, 1836, so as to apply to "all moneys that may hereafter be received under the treaties therein named, or under any others containing similar stipulations for the payment to the Indians annually, of interest upon the proceeds of the lands ceded by them."

The 1837 act was entitled, "An Act to regulate, in certain cases, the disposition of the proceeds of lands ceded by Indian tribes to the United States." It applied only to trust funds established from the proceeds of sales of ceded lands.

The first section provided that the net proceeds of such sales should be paid into the U.S. Treasury in the same manner as moneys received from sales of public lands. The second section was a permanent appropriation authorizing the withdrawal of such Indian moneys in conformity with treaties requiring their payment or investment. The third section read as follows:

> And be it further enacted, That all investments of stock, that are or may be required by said treaties, shall be made under the direction of the President; and special accounts of the funds under said treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress.

By 1838 there were some 13 Indian trust funds in the custody of the Secretary of War (as head of the department where the Bureau of Indian Affairs was then located) and one in the custody of the Secretary of the Treasury. They arose under various provisions of ten or more treaties. All were invested in state bonds, which had a total face value of $3,674,462.79.[11/]

State bonds were probably chosen as investments for the Indian trust funds because Federal bonds were unavailable (the national debt having been extinguished in 1835) and private securities were deemed inappropriate.[12/]

As it turned out, January 9, 1837, was a highly inopportune time to establish a policy of investing the Indian trust funds in preference to depositing them in the Federal treasury and paying out interest. A financial crash occurred within a matter of weeks, and in May most banks were forced to suspend specie payments. State bonds were severely affected. Tennessee paid interest only in the form of an unwithdrawable credit to the Treasurer of the United States on the books of the Union Bank at Nashville. Alabama and Mississippi defaulted outright on their interest payments. Maryland was unable to redeem its matured bonds,

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11/ Figures for the cost of the bonds given in Senate Document 426 (D-17) add up to $3,849,441.70; but H.R. Rept. 892, 25 Cong., 2d Sess. (1838) (see D-18), states the cost was $3,851,056.21.

12/ R. Bayley, The National Loans of the United States 67 (1882) (see D-5). In 1835 and 1836, before making the initial investment of the largest Indian trust fund of the period, the Chickasaw fund, Secretary of the Treasury Levi Woodbury did consider bank stock, but rejected this form of investment in favor of state stock. See contemporary correspondence in defendant's exhibits D-9 and D-43. The Secretary may have been influenced by contemporary English law, which prohibited trustees from investing in stock of any private company, without express authorization in the trust instrument. The only "legal" investments were Government and Bank of England Annuities. T. Lewin, A Practical Treatise on the Law of Trusts and Trustees, 308, 311 (1837); J. Willis, Duties and Responsibilities of Trustees, 126 (1827); see also G. Bogert, Trusts and Trustees, § 613 (2d ed., 1960).

but offered to continue paying interest in coin. Finally it defaulted on interest too.[13/]

By the fall of 1837, the United States itself had to go back in debt, borrowing $10,000,000 on treasury notes. See Act of October 12, 1837, c. 2, 5 Stat. 201; and D-5, p. 67.

Until 1833 the United States appears to have created trust funds only when it got the money from purchasers of Indian lands. Where it did not get the money from third parties, but wished to secure the Indians a permanent income, the Government used annuities.

This policy was changed during the Jacksonian prosperity. An educational trust fund of $70,000 was set up by direct disbursement from the Federal Treasury under Article 3d of the Chippewa, Ottowa and Potawatamie treaty of September 26, 1833, 7 Stat. 432. Trust funds were also established by direct disbursement from the treasury for the Cherokees under the Treaty of December 29, 1835, 7 Stat. 478; for the Menominies under the Treaty of September 3, 1836 (by Senate amendment), 7 Stat. 509, and for the Ottawas and Chippewas under the Supplemental Article to the Treaty of March 28, 1836, 7 Stat. 496.

During the ensuing depression, the Government did not quit promising to set up Indian trust funds by direct disbursement of its own money, but it quit making the disbursements. The Commissioner of Indian Affairs reported on November 28, 1840, that Congress was annually appropriating $131,005 interest in lieu of investing nine trust funds

13/. See contemporary correspondence to and from the Secretary of the Treasury in exhibits D-13 and D-14, and S. Doc. 52, 27th Cong., 1st Sess. (1841--D-32).

totaling $2,580,100.[14/] These were in addition to the invested trust funds,

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14/ These funds are listed as follows on page 278 of the Commissioner's Report (D-41). We have corrected a number of erroneous citations in the original.

Names of Tribes	Principal	Interest	Authority of Trust
Ottawa and Chippewa	$ 200,000	12,000	Senate amendment to Treaty of March 28, 1836, 7 Stat. 497.
Osage	69,120	3,456	Treaty June 2, 1825, 7 Stat. 242, as modified by Sen. Res. Jan. 19, 1838, Sen. Jour. 25th Cong., 2d Sess., 155.
Delaware	46,080	2,304	Supplementary Article Sept. 24, 1829, 7 Stat. 327, as modified by Sen. Res. of Jan. 19, 1838, supra.
Sioux of the Mississippi	300,000	15,000	Treaty Sept. 29, 1837, 7 Stat. 538.
Sac and Fox of the Mississippi	200,000	10,000	Treaty Oct. 21, 1837, 7 Stat. 540.
Sac and Fox of the Missouri	157,400	7,870	Treaty Oct. 21, 1837, 7 Stat. 543.
Winnebago	1,100,000	55,000	Treaty Nov. 1, 1837, 7 Stat. 544.
Creek	350,000	17,500	Treaty Nov. 23, 1838, 7 Stat. 574.
Iowa	157,500	7,875	Treaty Oct. 19, 1838, 7 Stat. 568
	$2,580,000	$131,005	

which in 1840 had a face value of \$3,998,462.73.[15/] Since the uninvested trust funds were all to be established by direct payment from the treasury rather than from the proceeds of land sales, the Act of January 9, 1837, was inapplicable. But in all cases except the Ottawa and Chippewa fund, the treaty or Senate resolution creating the trust required it to be invested rather than deposited at interest.

The Annual Report of the Commissioner of Indian Affairs for 1879 (D-86), at 310, shows four of the nine funds (Osage, Winnebago, and both Sac and Fox) as still uninvested. It also shows 24 subsequently established funds as uninvested, with Congress appropriating the annual interest. Most of the treaties and statutes creating the latter funds expressly authorized their deposit in the treasury at interest. In the earlier cases, however, this alternative to investment appears to have been authorized only by the annual appropriation acts which provided the interest.

The depression which started in 1837 was still going on in 1841. *See* Message from the President of the United States, H.R. Ex. Doc. 1, 27th

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Invested trusts administered by Secretary of War (D-41, p. 276):	\$1,897,321.76
Chickasaw fund, administered by Secretary of the Treasury (H.R. Doc. 145, 26th Cong., 1st Sess., 3 (1840) (D-19):	2,101,141.03
Total invested Indian trust funds in 1840:	\$3,998,462.79

Cong., 1st Sess. (1841--D-12). Some of the state bonds remained in default two years later (D-14), and one state was still in default 35 years later. See Annual Report of the Commissioner of Indian Affairs for 1876 (D-85, p. 275).

III. 1841 to 1880: INDIAN TRUST FUNDS REQUIRED TO BE INVESTED IN FEDERAL BONDS ONLY.

Against such a background Congress enacted the Act of September 11, 1841, requiring all "funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty [to] . . . be invested in stocks of the United States bearing a . . . rate of interest not less than five per centum per annum."

The following is the complete text of the act, which appears at 5 Stat. 465:

CHAP. XXV.--An Act to repeal a part of the sixth section of the act, entitled "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," passed July seventh, eighteen hundred and thirty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.

> Sec. 2. And be it further enacted, That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.
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> Sec. 3. And be it further enacted, That the three clerks, authorized by the act of June twenty-third, eighteen hundred and thirty-six, "to regulate the deposits of the public money," be, and hereby are, directed to be retained and employed in the Treasury Department, as provided in said act, until the state of the public business becomes such that their services can conveniently be dispensed with.

This act clearly superseded the third and fourth sections of the 1837 act, and the fourth section of the 1836 act, discussed above, which had given the President and Secretary of War discretion to invest the Indian trust funds in any kind of securities deemed safe and beneficial, so long as they bore at least 5 percent interest. It did not, however, change the general policy of these earlier acts, that the trust funds were to be invested, by purchasing certificates of outstanding issues, rather than deposited at interest in the U. S. Treasury as in a savings bank. Now, however, only Federal bonds could be purchased as trust investments.

A. The 1841 act is a direction to invest trust funds as well as a limitation on the kind of securities in which investment may be made.

The defendant contends the 1841 act created no duty to invest. It was a housekeeping statute, the defendant states, dealing only with the kind of securities in which trust investments were to be made; the duty to invest, where it existed, was imposed by treaty or some other law.

The plain language of the 1841 act, in our opinion, is enough to refute this contention. Congress knew how to phrase a statute so as to make it applicable to funds required to be invested by treaty. Thus, it wrote in section 3 of the 1837 act, 5 Stat. 135, ". . . all investments of stock that are or may be required by said treaties shall be made under the direction of the President . . ." If it had intended the meaning claimed for the 1841 act by the defendant, it could have written:

> Sec. 2. . . all other funds held in trust by the United States, and the annual interest accruing thereon, where investment is required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Congress did not use the underlined phrase. Instead, it used the phrase, "when not otherwise required by treaty". The natural meaning of the words actually used is almost diametrically opposed to the defendant's present interpretation.

By 1841, the duty of private trustees to make the beneficiaries' funds productive was well established in contemporary law.16/ It appears entirely probable that Congress would extend the rule of productivity to the public trust funds, if such rule did not already apply to them. This is what the words actually used in the act of September 11 imply. It appears in the same degree improbable that Congress, using the words it did, could intend to perpetuate the anomaly of indefinitely idle public trust funds, if such previously existed.

16/ 2 J. Kent, Commentaries on American Law *230-232 (3d ed., 1836); T. Lewin, A Practical Treatise on the Law of Trusts and Trustees 305 (1st ed., 1837); J. Willis, Practical Treatise on the Duties and Responsibilities of Trustees 181 (1827).

The defendant's position that the 1841 act applies only to trust funds required to be invested by some other law becomes even less tenable when one examines the Indian trust funds existing in that year which actually were invested. The defendant admits that these were within the purview of the act; yet a number of them were not, in fact, required to be invested by any prior law.

The invested Indian trust funds in existence in 1841 consisted of: 17/

(1) The Chickasaw National Fund, established under Article XI of the treaty of October 20, 1832, 7 Stat. 385, and Article XI of the Treaty of May 24, 1834, 7 Stat. 454. This trust fund was administered by the Secretary of the Treasury, by delegation of the President. *See* Presidential Message of December 23, 1835, and Senate Resolution of January 20, 1836, in Exhibits D-9 and D-43; *cf.* act of April 20, 1836, c. 53, 5 Stat. 10.

(2) The following funds administered by the Department of War, in which the Bureau of Indian Affairs was then located:

17/ *See* Commissioner of Indian Affairs' Report of November 16, 1842 (D-48); Report from the Secretary of the Treasury, September 8, 1841, S. Doc. 116, 27th Cong., 1st Sess. (D-20); Commissioner of Indian Affairs' Report of November 28, 1840 (D-41); and Secretary of the Treasury's Report of March 17, 1840, H.R. Doc. 145, 26th Cong., 1st Sess. (D-19). The funds listed on this and the following page are in addition to the funds on deposit in the treasury at interest, listed above in footnote 14.

	Beneficiary	Authority for Establishment of Trust
1.	Cherokee Schools	Art. 4, Treaty Feb. 27, 1819, 7 Stat. 197
2.	Cherokee Tribe	Art. 10, Treaty Dec. 29, 1835, 7 Stat. 483
3.	Chickasaw Incompetents	Art. IV, Treaty May 24, 1834, 7 Stat 451
4.	Chickasaw Orphans	Art. VIII, Treaty May 24, 1834, 7 Stat. 453
5.	Chippewa, Ottawa, and Potawatomie, Education	Art. 3d, Treaty Sep. 26, 1833, 7 Stat. 432
6.	Chippewa, Ottawa, and Potawatomie, Mills, etc.	Administrative action
7.	Choctaw Orphans	Art. XIX, Fifth, Treaty Sep. 27, 1830, 7 Stat. 337
8.	Choctaw Tribe	Art. III, Convention between Choctaw and Chickasaw Tribes, Jan. 17, 1837, 11 Stat. 574
9.	Creek Orphans	Art. 2, Treaty March 24, 1832, 7 Stat. 366
10.	Delaware Tribe	Supplementary Treaty, Sep. 24, 1829, 7 Stat. 327, as modified by Senate Res. Jan. 19, 1838, Sen. Journal, 25th Cong., 2d Sess. 155 (1838)
11.	Kansas Schools	Art. 5, Treaty June 3, 1825, 7 Stat. 245
12.	Menominie Tribe	Senate amendment to Treaty Sep. 3, 1836, 7 Stat. 509
13.	Osage Tribe	Art. 6, Treaty June 2, 1825, 7 Stat. 242, as modified by Sen. Res. Jan. 19, 1838, <u>supra</u>
14.	Ottawa and Chippewa Nations	Articles Fourth and Fifth, Treaty March 28, 1836, 7 Stat. 492
15.	Senecas of Sandusky	Art. 8, Treaty Feb. 28, 1831, 7 Stat. 350, as modified by Act June 14, 1836, c. 88, 5 Stat. 47

	Beneficiary	Authority for Establishment of Trust
16.	Senecas and Shawnees of Lewistown	Art. VIII, Treaty July 20, 1831, 7 Stat. 353, as modified by Act June 14, 1836, *supra*
17.	Shawnees of Wapaghkonetta and Hog Creek	Art. VII, Treaty Aug. 8, 1831, 7 Stat. 357, as modified by Act June 14, 1836, *supra*
18.	Stockbridge and Munsee Schools	Art. 4, Treaty Sep. 3, 1839, 7 Stat. 581

Investment provisions are wholly lacking in the treaties numbered 10, 11, and 13 in the above list.

The Menominie trust fund (No. 12 in above list) was created by a Senate amendment, the original treaty providing for neither a trust nor a fund.

The Choctaw fund (No. 8 above) was established by a treaty between two Indian tribes, to which the United States was not a party, although the President and the Senate gave their approval. The intertribal treaty provided for a sale by the Choctaws of an interest in their land to the Chickasaws, in return for the latters' setting over to them a portion of the Chickasaw trust fund.

The Chippewa, Ottawa, and Potawatomie United Nation "mill fund" (No. 6 above) was created by administrative action. The circumstances of its creation are revealed thus in the Commissioner of Indian Affairs' report of November 28, 1840 (D-41, at page 279):

Beneficial objects for Chippewas, Ottowas, and Pottawatomies.

By the 3d article of the treaty of 26th September, 1833, the United States contracted to apply $150,000 "to the creation of mills, farm houses, Indian houses, and blacksmiths' shops; to agricultural improvements, to the purchase of agricultural implements and stock, and for the support of such physicians, millers, farmers, blacksmiths, and other mechanics, as the President of the United States shall think proper to appoint." The above sum was applied, on the 1st January, 1837, to the purchase of $130,850 43 of Maryland six per cent. stock, which has yielded, up to 1st July last, of interest, $19,627 52, and cost $150,000.

There is no direct authority in the treaty for investing the above money; but it appears that a letter was, on the 14th December, 1836, addressed by my predecessor to the Secretary of War ad interim, proposing to invest the said sum in some safe and productive stock. This letter was subsequently withdrawn, and for it appears to have been substituted, on 1st January, 1837, a general authority from the Secretary to the then Commissioner of Indian Affairs to direct investments, &c.; under which, it is believed the above investment was made. The sum was very large for the purposes pointed out in the treaty; and the investment was judicious, in my opinion, as furnishing a permanent fund, the annual yield of which will be probably equal to all the Indian wants. The interest, however, ought to be reinvested until its expenditure is deemed advisable, so as to enlarge the fund.

The Commissioner of Indian Affairs points out in the same report the dubious legal basis for holding in trust the funds appropriated under the fifth article of the Ottawa and Chippewa treaty of March 28, 1836 (No. 14 in the above list). This article provided for setting $300,000 aside for payment of the Indians' debts. As originally written, it stated that if the debts did not amount to that sum, the balance was to be "paid over to the Indians, in the same manner, that annuities are required by law to be paid". A supplemental article, signed March 31, 1836, provided that the balance was to be retained "and vested by the Government in stock". See 7 Stat. 497.

In ratifying the treaty, however, the Senate further amended the fifth article to provide that the balance was "to apply to such other use as they [the Indians] may think proper". Sen. Res., May 16, 1836, 4 Sen. Ex. Jour. 542.

In his 1840 report, cited above, the Commissioner stated that he found no request by the Ottawas and Chippewas for the application of the balance of their debt fund, but that $75,460 of it had nevertheless been invested in Kentucky bonds. The Commissioner continued (at page 281):

> It will thus be seen that there was no direct authority for the investment in Kentucky stock; but yet I cannot but regard the course adopted as the most judicious and beneficial for the Indians, who should be paid the interest punctually and annually, which has not been done heretofore.

The Commissioner of Indian Affairs' Report was appended to the President's Message to the Two Houses of Congress at the Commencement of the Second Session of the 26th Congress and published in House Executive Document No. 2, 26th Congress, 2d Session. Thus Congress was not only aware of the lack of express requirements for investment in several of the treaties under which trust funds had been established, but also knew that two of them had been established extralegally. There is no evidence that Congress disapproved of what had been done. On the contrary, the plain language of the 1841 act, which states, "all funds held in trust by the United States. . .shall. . .be invested. . .," implies an intent to legalize and adopt the Indian Commissioner's actions.

In support of its position that the 1841 act applied only to funds elsewhere required to be invested, the defendant points out, however, that the Government had certain trust funds which were not invested before 1841 and remained uninvested thereafter.

Expenditures only from several funds alleged to fall in this category are shown in H. R. Ex. Doc. 31, 27th Cong., 1st Sess. (July 9, 1841--D-39). They bear such captions as "Awards under convention with the King of the Two Sicilies," "Awards under the first article of the treaty of Ghent," and "Payment of demands for unclaimed merchandize". Most of these appear to have been passive trusts, where the Government's only duty was to pay over to the beneficiaries as soon as they came forward and identified themselves. Such funds being subject to immediate withdrawal, investment may often have been infeasible.

None of these funds appears to have been invested, or borne interest, before 1841. It seems, however, that the State Department trust funds, like the two award funds named above, were invested after 1841. See "Trust Funds, State Department," H. R. Ex. Doc. 362, 49th Cong., 1st Sess. (1886--D-95); United States ex rel. Angarica v. Bayard, 127 U. S. 251 (1888); cf. Henkels v. Sutherland, 271 U. S. 298 (1926); Great Western Insurance Co. v. United States, 19 Ct. Cl. 206, aff'd 112 U. S. 193 (1884). The history of the trust funds which were unproductive in 1841 thus gives poor support to the defendant's interpretation of the act of that year.

Many cases of idle trust money in the Government's custody can probably be explained on the practical ground that ready cash was needed for early disbursement, or that there had not been sufficient time to invest incoming funds. Congress knew cash must be available in the trust accounts a reasonable time in advance of anticipated expenses and distributions, and that it took time to collect and invest trust moneys from the field, such as the proceeds of sales of Indian land. See, e.g., remarks of Senator Wright concerning the Chickasaw fund at 9 Cong. Globe 32 (Dec. 17, 1840).

Private trust law in 1841, and today, allows the trustee to hold cash a reasonable time before investment and prior to disbursement. J. Willis, Duties and Responsibilities of Trustees, 181 (1827); cf. Barney v. Saunders, 58 U. S. (16 How.) 535 (1853); in re Thorp, 23 F. Cas. 1153 (No. 14,002, D.C.D. Me. 1846); and compare G. Bogert, Trusts and Trustees, §§ 611, 702 note 36 (2d ed., 1960). Clearly, Congress did not intend every last penny of the Government's trust funds to be invested every moment; but it did intend all such funds to be invested if they were on hand long enough to make investment practicable. Cf. Menominee Tribe v. United States, 107 Ct. Cl. 23 (1946).

B. Legislative history of 1841 act -- Part 1: Section 2 had its source in Senate Amendment.

The legislative history of the Act of September 11, 1841, in the first session of the 27th Congress serves only to confirm the statute's plain language.

On September 1, 1841, Congressman John Quincy Adams asked the House of Representatives to act upon a series of resolutions condemning the investment of Federal funds--the Government's own and those it held in trust--in state securities. The following one of them was passed:

> Resolved, That the further investment of any public funds of the United States in stocks of the several States ought forthwith to be prohibited by law; and that the Committee of Ways and Means be instructed to report a bill for that purpose.[18/]

The former President was particularly concerned with the safety of the James Smithson bequest, which, by a rider on the Military Academy Appropriation Act of 1838,[19/] had been ordered invested, together with its accruing interest, in state stocks. He had just managed to secure payment of some of the defaulted state bonds in the Government's trust portfolios by getting an amendment into the act which granted Federal public land revenues to the states. The Adams amendment required each state's share to be first applied on its debts to the United States.[20/] Mr. Adams feared also that investment of Federal moneys in state stocks would lead to favoritism by Federal officials as between states. See H. R. Ex. Doc. No. 11, 25th Cong., 3d Sess. (1838) (D-29).

On September 2, 1841, Millard Fillmore, the Chairman of the Ways and Means Committee, responded to Mr. Adams' resolution by reporting out H. R. 34. It was read twice, as follows (D-34):

18/ Cong. Globe September 1, 1841, 419 (B-3).

19/ Sec. 6, Act of July 7, 1838, c. 169, 5 Stat. 267.

20/ Sec. 4, Act of September 4, 1841, c. 16, 5 Stat. 454.

An act to repeal the 6th section of the act entitled "An act to provide for the support of the Military Academy of the United States, for the year 1838, and for other purposes," passed July 7th, 1838." and to prohibit the investment of funds of the United States in stocks of the several States.

Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled: That so much of the Sixth Section of the act entitled "An Act to provide for the support of the Military Academy of the United States for the year 1838 and for other purposes" passed July 7, 1838, as is inconsistent with this act, be and the same is hereby repealed; and the further investment of any public or trust funds of the United States in stocks of the several States is hereby prohibited. [Emphasis as in original handwritten bill]

H. R. 34 was immediately put on third reading, read, and passed without debate. 10 Cong. Globe 421 (Sep. 2, 1841) (B-3).

At this point, the bill meant approximately what the defendant contends the Act of September 11, 1841, means. It forbade investments of Federal funds in state securities, and no more.

The next day the House-passed bill was read twice in the Senate. Senator Sevier said "that this bill was one of a most extraordinary character. It was to repeal existing contracts, and to violate treaty stipulations with the Indians. . ." Senator Woodbury (the former Secretary of the Treasury, under whose direction state bonds had been purchased for the Chickasaw trust fund) answered "that the bill could be only prospective in its character, and would have no effect on existing contracts". 21/

21/ Sevier had sold $35,000 of Arkansas state bonds to Woodbury for the Chickasaw fund in 1838. H. R. Doc. 65, 27th Congress, 3d Session (1843) (Ser. 420).

Mr. Sevier moved to refer the bill to the Committee on Indian Affairs; but his motion lost, and H. R. 34 was referred to the Committee on Finance. 10 Cong. Globe 422 (Sep. 3, 1841). The choice of committees is significant, for it placed the bill under study by men whose concern was primarily with the public finances rather than Indian matters. One of the results was a uniform legislative treatment of the Smithsonian trust, the Indian trusts, and the other trust funds of the Government, which appears not to have occurred previously or ever to have been repeated.

The Finance Committee struck out all after the enacting clause, and on September 8 reported H. R. 34 out in the following form (D-37):

> That so much of the sixth section of an act entitled "an act to provide for the support of the Military Academy of the United States for the year 1838 & for other purposes" as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson of London, in the stocks of States, be & the same is hereby repealed; & the Secretary of the Treasury shall invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.
>
> Sec. 2. Be it further enacted, that all other ~~trust~~ funds [interlined] held in trust by the United States [end interlineation] and the annual interest accruing thereon, when not otherwise required by treaty shall in like manner be invested in stocks of the United States, bearing a like rate of interest--

The second section of the Act of September 11, 1841, thus derives from the Senate Finance Committee amendment, not from the original bill.

C. Analysis of language of Section 2 of 1841 act.

1. ". . .all other funds held in trust by the United States. . ."

Whatever else the phrase in the Senate amendment "all other funds held in trust by the United States" extended to, there can be no reasonable doubt that it included the Indian trust funds. Indeed, the Senate's attention was particularly focused on these funds during its consideration of H. R. 34.

The Secretary of the Senate wrote to the Secretary of the Treasury on September 8, 1841--the same date the Finance Committee reported out H. R. 34 in amended form--requesting "for use in the Senate to day a copy of the report of the Secretary of the Treasury dated 23 December, 1835, in relation to the Chickasaw funds or stock to be purchased for the same. . ." (D-42). The Secretary of the Treasury complied before the day was over, sending a copy of President Jackson's 1835 message to the Senate proposing an investment program for the then newly-established Chickasaw fund. (D-43, D-44.)

The Secretary of the Treasury chose the same day, September 8, 1841, to respond to a resolution passed a month before upon motion of Senator Sevier. This resolution instructed the Secretary to inform the Senate "what amount of Indian money, legacies, or trust funds have been invested in State stocks; and in the stocks of which States, and the amount of any such investments in each State where the investments have been made." See Senate Journal, 27th Cong., 1st Sess., 136.

Mr. Sevier explained that "he had called for this information in consequence of a section in the land bill, in which States were held up as indebted, and among them his own State [Arkansas], and he desired the facts in the case." 10 Cong. Globe 292 (Aug. 4, 1841). The "land bill" was the revenue-sharing measure then pending before the Senate which became the Act of September 4, 1841 (supra, note 20). The section having to do with states' indebtedness was the Adams amendment, mentioned above, adopted in the House on July 6, 1841 (10 Cong. Globe 155).

The Secretary's report in response to the Sevier resolution covered all the invested trust funds of the United States then in existence, illustrating what the defendant concedes to have been meant by the phrase in the 1841 act "funds held in trust by the United States." See S. Doc. 116, 27th Cong., 1st Sess. (Serial 390, D-20).

The state stock held by the United States is described in three tables. The first is entitled, "Description of stock held by the United States in trust for the Chickasaw Indians." The second is entitled, "State stocks held by the Treasury Department in trust for the Smithsonian Institution." No distinction between the trust status of the two funds is indicated, although the act creating the Smithsonian fund expressly states that it shall be held "in trust," while the word "trust" does not appear in the treaties creating the Chickasaw fund. Compare § 6, act of July 7, 1838, c. 169, 5 Stat. 276, with Act XI, Treaty of October 20, 1832, 7 Stat. 385, and Art. XI, Treaty of May 24, 1834, 7 Stat. 454.

The third table in the Secretary of the Treasury's report of September 8, 1841, covers the Indian trust funds administered by the War Department. It is entitled, "Statement showing the States in whose stocks investments have been made out of Indian trust funds, the amount invested in each State's stock and the par value of each." The funds referred to in this table are not identified by tribes, but can be identified by cross-reference to the Secretary of the Treasury's Report of March 17, 1840 (H.R. Doc. 145, 26th Cong., 1st Sess.) (D-19), and the Commissioner of Indian Affairs' Report of November 28, 1840 (D-41), and brought down to date by reference to the Commissioner of Indian Affairs' Report of November 16, 1842 (D-48). These funds are listed above on pages 444-445 of this opinion.

The word "trust" occurs in only one of the treaties or resolutions establishing the above-listed funds. See Art. 1, Cherokee Treaty of 1819, No. 1 in the list on page 444, supra.

The words of art traditionally used to create private trust funds, "for the use and general benefit of," appear in only three treaties (Nos. 15, 16, and 17 above). These three, interestingly enough, are the only ones in the list where the trust provisions were amended unilaterally by Congress, something which would have been impossible with the kind of "technical" trust fund the Chippewas unsuccessfully contended for in Chippewa Indians v. United States, 307 U. S. 1 (1939).

Most of the treaties establishing Indian trust funds contained no "magic" words at all indicating trust status. This was entirely consistent with private trust law, which in 1841 as today required no particular formula or ceremony to create an express trust. See J. Story, Equity Jurisprudence § 980 (1836), quoted below at page 500; Restatement (Second) of Trusts § 24 (1959).

As noted above, one of the funds was created by a treaty between two Indian tribes, and two were established by administrative action without express authority of law.

Despite the disparate formalities by which they were created, neither the administration nor the Congress discriminated among the above-listed Indian trust funds.

Thus, the Commissioner of Indian Affairs termed his report of May 3, 1838, listing all of these same funds which were already in existence on that date, "a full statement of all moneys under the control of the Government, held in trust for the Indians." S. Doc. 426, 25th Cong., 2d Sess. 2 (1838--D-17--emphasis in original).

The House Indian Affairs Committee referred to the same funds, plus the Treasury-administered Chickasaw fund, without distinction, as "trust funds" on May 15, 1838. H.R. Rept. 892, 25th Cong., 2d Sess. (1838--D-18).

In response to a resolution of the House of Representatives directing him to furnish a statement of "all the public moneys of the United States invested in the stocks of the several States", the Secretary of the Treasury reported as follows on March 17, 1840 (H. R. Ex. Doc. 145, 26th Cong., 1st Sess. (1840) (D-19)).

> . . . I have the honor to state that this department is not aware that any "of the public moneys of the United States," held in their own right, are "invested in the stocks of the several States." But some of the moneys held in trust by the United States have been invested in such stocks, either by agreement with those possessing the legal title, such as treaty stipulations with Indian tribes; or by authority of acts of Congress, such as that of the 7th of July, 1838, concerning the moneys received on account of the Smithsonian bequest. [Emphasis in original.]

There followed a list of all the same funds set out on pages 444-445 of this opinion, except the Choctaw, Delaware, Osage, and Stockbridge and Munsee funds, which appear not yet to have been set up.

The defendant concedes, at page 53 of its brief, that the funds listed in H. R. Ex. Doc. 145 (D-19), as well as the uninvested funds named in H. R. Ex. Doc. 31, 27th Cong., 1st Sess. (D-39), discussed in a previous section of this opinion, are comprehended in the term "funds held in trust by the United States".

Clearly, the phrase "funds held in trust by the United States" was in common usage in the government parlance of 1841. The term was broadly inclusive, and extended at least to all Indian funds held by the Government at the Washington level. It could have had no narrower meaning when used by Congress without limiting language in the act of September 11 of that year.

2. ". . .and the annual interest accuring thereon. . ."

The provision in section 2 for investing interest exemplifies the uniformity of treatment by the Finance Committee of the Smithsonian and Indian trust funds. Investment of the Smithsonian interest had been required by section 6 of the act of July 7, 1838, c. 169, 5 Stat. 267, which was adopted actually before Smithson's bequest arrived from England, in eleven boxes of gold sovereigns. 22/ Section 1 of the 1841 act requiring the Smithsonian interest to be invested in Federal bonds replaced the earlier law's requirement for investment in state bonds.

Adhering to its position that the 1841 act created no new duty to invest, the defendant contends the phrase "and the annual interest accruing thereon" applies only to the income from trust funds which some other law required to be reinvested. There was only one such fund in 1841, the Menominie fund, created by Senate amendment to the treaty of September 3, 1836, 7 Stat. 509.

The defendant, in short, would have us hold that section 2 of the 1841 act is not self-executing.

Section 1 of the act, however, clearly is self-executing. That section did not amend but repealed the provisions of the act of July 7, 1838, relating to the investment of interest accruing on the Smithsonian

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22/ 1 W. Rhees, The Smithsonian Institution, Documents Relative to its Origin and History 100, 101 (1901) [hereinafter cited as Rhees].

The driblets of interest on the Smithsonian investments which came in after September 11, 1841, were, in fact, reinvested by the Secretary of the Treasury in U.S. Government bonds. Rhees 243-244.

fund. After September 11, 1841, the only remaining law which required investment of the Smithsonian interest was section 1 of the act of that date.

Section 2 of the 1841 act states that the annual interest accruing on all other trust funds of the United States shall be invested in Government bonds "in like manner" to the Smithsonian interest. The words used give no justification for construing section 2 as any less mandatory and self-executing than section 1.

If Congress had meant for Indian trust fund interest to be reinvested only when a treaty or other law so required, there would have been no need to use the phrase "and the annual interest accruing thereon" in section 2. Interest retained for reinvestment under a treaty so requiring was as much a "fund held in trust by the United States" as the original principal. Section 2 minus the phrase "and the annual interest accruing thereon" would have required such retained interest to be invested. The presence of the phrase in the section, therefore, implies that interest not elsewhere required to be reinvested is now to be reinvested.

Since invested interest, like the original principal, is also a "fund held in trust by the United States," interest earned upon the invested interest must be invested in turn. Hence the phrase, standing alone, would contemplate accumulation and successive compounding of interest. In the case of the Smithsonian fund, accumulation was clearly required. The purpose of the accumulation was to augment the fund while Congress pondered the difficult question of how best to effectuate the donor's purpose of founding "an Establishment for the increase and diffusion of knowledge among men." Congress did not, in fact, found the Smithsonian Institution until eight years after receipt of the legacy. See act of August 10, 1846, c. 178, 9 Stat. 102.[23/]

Section 2 of the 1841 act, of course, did not mean that every cent of interest on the Indian trust funds had to be plowed back like the Smithsonian interest. Expenditure of income was necessary from time to time in the case of the Indian funds (except the Menominie fund) to accomplish the purposes of the trusts.

There is no need to do violence to the plain language of the 1841 act in order to permit such expenditure. The phrase "and the annual interest accuring thereon" does indeed provide for accumulation, but it does not stand alone. The next phrase, "except as otherwise required by treaty," exempts interest that must be spent for trust purposes from the command to invest.

Arguments that the phrase "and the annual interest accruing thereon" is not to be taken literally seem based on an assumption that Congress

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23/ Little reinvestment of interest and no augmentation of the fund actually took place, because the bulk of the legacy was invested in Arkansas bonds, which the state repudiated. Letter of Secretary of Treasury to Speaker of the House, February 17, 1844, reprinted in Rhees at 241-265. See also speech of Representative J.Q. Adams, reprinted at 268-273.

acted inadvertently in placing such language in section 2 after providing for reinvestment of the Smithsonian interest in section 1.

We believe Congress knew what it was doing. We believe section 2 of the 1841 act means what it says.

A problem sometimes encountered by trustees is what to do with income in excess of that needed to accomplish the purposes of the trust. The problem can arise only when the trustee's obligation to pay out of the trust is measured by some standard other than the trust income. For example, if a testator leaves a fund to a trustee with directions to pay the income over to the beneficiary as it accrues, there will be no problem. If instead he directs the trustee to use the income for the education of the beneficiary, the problem will arise if the income exceeds the cost of education.

A far-sighted trustor may anticipate the problem of surplus income and include appropriate instructions in the trust instrument. Accumulation is a favored solution where the demand on the fund is fluctuating or increasing. Cf. G. Bogert, Trusts and Trustees §811 (2d ed., 1964).

Congress foresaw the problem of surplus income under one of the earliest trust funds of the Federal Government, the Navy Pension Fund, and provided for accumulation. See §§ 8-10, Act of April 23, 1800, c. 33, 2 Stat. 53.

Until 1841 Congress did not provide a rule to govern disposition of surplus income of the Indian trust funds. Most of the Indian trust funds then existing were of the class where the problem could not arise For example, the trusts numbered 8, 15, 16, 17, and 18 in the list on pages 444-445, above, and all but the Osage and Delaware trusts listed in footnote 14, expressly required accruing interest "annually" to be paid to the Indians or wholly expended for specified purposes. In these trusts there could be no reinvestment of accruing interest, because it was "otherwise required by treaty."

Similarly, the problem of surplus income could not arise where the trustee was authorized to do nothing else with the income except re-invest it, as in the case of the Menominie fund.

The problem of surplus income did arise, however, in 1840 under the Chickasaw orphan fund, the Chippewa, Ottawa, and Pottawatomie mill fund, the Creek orphan fund, and the Kansas school fund. The incumbent Commissioner of Indian Affairs, T. Hartley Crawford, reinvested the surpluses on his own initiative.

The Commissioner gave full details on the reinvestments in his report of December 28, 1840. The report appears as an annex to the Message of the President to the Two Houses of Congress, H. R. Ex. Doc. No. 2, 26th Cong., 2d Sess., starting at page 228 (D-41). It was the latest document describing the administration of the Indian trust funds available when Congress considered the bill which became the 1841 act. If the Senate Finance Committee wished to examine existing practice, this is the document they would have consulted.

It is possible that the Committee reviewed the report and intended the reference to reinvestment of interest in section 2 of the 1841 act as conscious approval of Commissioner Crawford's action.[24/] In any event, Congress did adopt as law a policy on reinvesting interest of the Indian trust funds similar to Crawford's and similar to that required for the Navy Pension Fund,[25/] when it enacted:

> . . .all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty shall . . . be invested in stocks of the United States . . .

The surrounding circumstances as well as the language used show the requirement for accumulation in section 2 of the 1841 act was no inadvertence. It solved the problem of surplus income. The requirement for investment of accruing interest did not apply to interest a treaty commanded to be paid over to the beneficiary. It did not apply to interest currently needed to accomplish a treaty purpose, for example, to build schoolhouses. It applied to interest the treaty did not command to be paid out and which was for the time being in excess of that needed to accomplish the trust purposes.

The defendant, however, has appealed from the words of the law to its subsequent administrative construction, writing thus:

> . . . The documents furnished by the plaintiffs and defendant herein, along with other records to the same

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24/ Mr. Crawford's administration of the Bureau of Indian Affairs seems to have inspired extraordinary confidence. Despite the change of administration and of control of Congress from Democratic to Whig in 1841, Crawford, appointed by President Van Buren in 1838, remained in office. He survived during the entire Tyler administration, serving longer than any other Commissioner of Indian Affairs in the 19th Century. F. Cohen, Handbook of Federal Indian Law 12 (1941).

25/ The Navy Pension Fund had been exhausted prior to adoption of the 1841 act. *See* H. R. Rep. No. 1, 27th Cong., 1st Sess. (Ser. 393, June 29, 1841). The last security held by the fund was sold on January 14, 1840. H. R. Ex. Doc. No. 145, 26th Cong., 1st Sess. 5 (Ser. 365, 1840) (D-19).

> effect reposing in the National Archives, attest to the attentive interpretation that the responsible officials gave to the statute [of 1841]. They perceived that without express provisions in a prior treaty or, after 1871, a ratified agreement, they had no authority to invest accruing interest. The matter was so self-evident to them that after 1840 the question as to whether they did or did not have that authority never arose.

We pass over the dubious proposition that an administrative interpretation may be shown by the fact that the administrators never considered the question, and reject the defendant's contention on the merits.

First, the statement is not factually correct. 26/

26/ Interest on the Ottawa and Chippewa fund, established with an original principal of $20,000 under Article 4 of the Treaty of March 28, 1836, 7 Stat. 492, continued to be reinvested after 1840. The fund grew to $62,496.40 by 1885. See Ottawa and Chippewa Indians v. United States, 42 Ct. Cl. 240, 245 (1907). Interest on the Creek Orphan Fund was also reinvested. This fund, amounting to $126,000 in 1840, grew to $251,055.97. See S. Rept. 411, 43d Cong., 1st Sess. (1874).

From the materials submitted by the parties it has not been feasible to identify the occasions subsequent to 1840 when trust fund interest was reinvested, even in the case of the Menominie fund, where accumulation was required by treaty.

The treasury appears not to have kept separate principal and interest accounts in the 1830's, '40's, and '50's. Published reports show only a cash account and an investment account. Interest was credited to the cash account when it was collected in the same manner as were additions to principal, such as the proceeds of land sales; and distributions to beneficiaries were debited in the same manner as sums expended to purchase investments. The investment account was simply a list of bonds held for the trust without indication of the source of the moneys used to purchase them. See Statements of the Secretary of the Treasury of the Chickasaw trust funds: H.R. Ex. Doc. No. 107, 29th Cong., 1st Sess. (1846) (D-77); H. R. Ex. Doc. No. 57, 32d Cong., 2d Sess., (1853) (D-50); and other reports in the same series cited in D-78.

The Commissioner of Indian Affairs in his annual report of November 25, 1854 (B-11) stated that it would be a good policy to reinvest certain accrued interest then on hand, but that he had not done so due to the high premium on Federal bonds, pending new legislation authorizing the purchase of state stocks. Such legislation was not enacted, and the record does not show whether the suggestion of reinvestment was pursued.

In any event, administrative observance of the 1841 act was so sporadic as to furnish no reliable guide to the meaning of the statute. See discussion and examples below.

Second, history shows that the officers administering the Indian trust funds acquired $2,751,900 in state bonds for those funds subsequently to 1841. Annual Report of the Commissioner of Indian Affairs for the Year 1876, 275-277 (D-85). The construction of any part of a statute by men who repeatedly violated its clearest provision--to invest only in stocks of the United States--does not command respect.

Finally, in our opinion, no course of administrative action, however consistent, can prevail over language as clear and unambiguous as that of the 1841 act. Louisville and Nashville Northern R. R. v. United States, 282 U. S. 740, 759 (1931).

By the plain language of the 1841 act all interest on Indian trust funds which a treaty did not require to be paid out or otherwise used had to be invested. The act means exactly what it says.

3. ". . . when not otherwise required by treaty. . ."

The exception in the Senate amendment to H. R. 34, ". . . when not otherwise required by treaty", appears to have been adopted in response to Senator Sevier's objection that the House bill would violate Indian treaties.

The defendant points out that three treaties in force in 1841 required investment of Indian trust funds in state stocks. These treaties were (1) that of May 9, 1836, with the Chippewas of Swan Creek and Black River, 7 Stat. 503, (2) that of September 29, 1837, with the Sioux of the Mississippi, 7 Stat. 538, and (3) that of October 21, 1837, with the Sacs and Foxes of the Mississippi, 7 Stat. 540.

It is difficult to believe that Congress was primarily concerned with avoiding technical breach of these treaties when it adopted the phrase "when not otherwise required by treaty". It would have been nearly inexcusable in 1841 for a fiduciary to limit his investments to state bonds.

An earlier Congress had no qualms about putting the Seneca and Shawnee funds in state bonds, despite treaty language contemplating deposit of the money at interest in the U. S. Treasury. See Act of June 14, 1836, discussed in Part I of this opinion. That action seems to have had no better justification than a desire to avoid paying interest during a period when the Government had no need to borrow. In other words, the trustee did not hesitate to harmlessly breach a treaty when its own self-interest so required. In 1841, on the other hand, with state bonds in default, the beneficiaries' interests would have justified, if not dictated, that the trustee disregard directions to invest in state bonds in order to buy safe, punctually paying Federal issues. Cf. Restatement (Second) of Trusts § 167.

In fact, none of the three trust funds required by treaty to be invested in state bonds was so invested in 1841. The Chippewa fund had not yet been set up on the Indian Office's books, presumably because of delay in receipt of land sale proceeds. The Sioux of the Mississippi and Sac and Fox of the Mississippi funds were among those for which Congress failed to appropriate the principal sum, paying only annual interest out of the treasury. They were never invested in state bonds. See above, footnote 14.

The important function of the phrase, "when not otherwise required by treaty", in the context of the Senate amendment, was to save existing treaty provisions for the disposition of trust fund interest which were inconsistent with reinvestment.

4. "*. . . shall in like manner be invested in stocks of the United States. . .*"

The applicable definition of "stock" in what in 1841 was the latest edition of Noah Webster's *American Dictionary of the English Language*, the 13th, published at New York in 1834, read as follows:

> 12. Money lent to government, or property in a public debt.

See also footnote 6, above.

In the accepted contemporary meaning of its words, therefore, the phrase, "shall in like manner be invested in stocks of the United States", was a direction to invest in Federal public debt obligations.

The defendant argues, however, that the change of language made by the Senate Finance Committee did not alter the purpose of H. R. 34. The amendment was adopted, the defendant says, to minimize the bill's depressing effect on the market for state bonds, not to change its thrust from a limitation on the kind of securities in which Indian trust funds might be invested into a command to invest funds formerly permitted to lie idle.

In support of this contention the defendant refers us to the following bills of the 25th Congress, which, it states, show the course of Congressional thinking on the subject of trust funds:

> S. 257, 25th Cong., 2d Sess., introduced by Senator Hugh S. White, Chairman of the Committee on Indian Affairs, on March 9, 1838 (D-24). This was an administration bill, drafted in the Indian Office, and forwarded to the Chairman by President Van Buren's Secretary of War, Joel R. Poinsett, on March 6, 1838. See D-22 and D-23. It restated the 1837 act with amplifications and would have expressly required the trust funds to be invested in state stocks.
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> H. R. 791, 25th Cong., 2d Sess., introduced by Congressman Horace Everett (Whig, Vt.) on May 15, 1838 (D-27). This bill would have required investment of the Indian trust funds in "stock of the United States, to be created for that purpose. . ."
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> H. R. 867, 25th Cong., 2d Sess., introduced by Mr. Everett on July 2, 1838 (D-25). This bill would have provided for the payment of 5 percent interest on Indian trust funds deposited in the treasury, including funds required by treaty to be invested, during the period they might remain on deposit pending investment.

We have considered the cited bills, and their legislative history, and find nothing to cause us to doubt that the 27th Congress meant what it said in the 1841 act.

Common sense as well as the rules of statutory construction tell us that when Congress substitutes new language for old, by abandoning one bill for another, or striking out all after the enacting clause in a pending bill, it ordinarily intends a change in meaning. See 2 J. Sutherland, Statutory Construction, § 5015 (3d ed., 1943). The earlier bills failed, whereas the 1841 Senate Finance Committee amendment was approved and enacted. The different approach of the latter version may well be one of the reasons Congress adopted it after rejecting the earlier bills.

5. "<u>. . .bearing a like rate of interest.</u>"

The reference to 5 percent interest is evidently taken from the Act of June 14, 1836, discussed above. Notably, it is the only portion of sections 1 or 2 of the 1841 act which shows any intent to preserve pre-existing law. In fact, the phrase substantially extended the 5 percent floor, since the 1836 act, even as extended by the Act of January 9, 1837, applied only to a limited class of Indian trust funds, that is, those made up of the proceeds of sales of ceded Indian lands.

Five percent is a minimum figure. Nothing in the phrase prevents investment in Government bonds of higher yield, such as were actually issued in 1841 and on several subsequent occasions.

Verbal analysis of the second section of the 1841 act emphasizes the sweeping character of the legislation against the defendant's claim that it was a mere housekeeping measure. While the Senate Committee could have attained increased safety for the Indian and Smithsonian trust funds by a narrow amendment, it chose to command that "all" funds held in trust by the United States, even "the annual interest accruing thereon", be invested in Government bonds, except when "otherwise required by treaty".

We turn back to the legislative history in search of the Senate Finance Committee's motives for adopting such far-reaching language.

D. Legislative history of the 1841 act--Part II: the Government needed the Indians' money.

The Senate took H. R. 34 up later in the same day it was reported by the Finance Committee. Mr. Calhoun asked how the trust funds were to be invested if there should be no United States stock to be had. The Chairman of the Committee on Finance answered as follows (10 Cong. Globe 441, Sep. 8, 1841) (B-3):

> Mr. EVANS replied that all that had been taken into consideration in committee, and it was the unanimous impression that there would be a sufficient supply of United States stock in existence for the next three years at least, and that no difficulty could arise in that way. If, however, any difficulty of that nature should arise, provision could be made by Congress in time to meet it.

The defendant characterizes Senator Calhoun's question as "prescient", and Senator Evans' answer as "breezy". We find them quite the opposite.

The contemporary situation in regard to United States securities, which must have been that taken into consideration in committee, was this:

The U. S. Treasury kept afloat during the entire four years of the Van Buren administration (1837-1841) by issuing and reissuing one-year notes. During this period expenditures had exceeded revenues by $31,310,014.20.

The financial situation of the country became so bad that a special session of Congress was called to deal with the subject early in the new administration (Tyler's, Harrison, elected in 1840, having died after one month in office). Congress decided that the only remedy was a loan redeemable at a time sufficiently distant to allow the public finances, aided by returning prosperity among the people, a chance for recovery. A bill was introduced authorizing a loan of $12,000,000 for an eight-year term, at an interest rate not exceeding 5 percent. It passed, as the Act of July 21, 1841, c. 3, 5 Stat. 438; but not before heavy opposition had caused the term to be reduced to three years, and the interest raised to not exceeding 6 percent. See Debates on H. R. 5, 27th Cong., 1st Sess., 10 Cong. Globe 111, 161, 162, 164-167, 175, 176, 178-181, 189-191.

Clearly, the term of the 1841 bonds was what Senator Evans referred to in his answer to Senator Calhoun when he mentioned "the next three years".

The first of the bonds authorized by the Act of July 21, 1841, were sold in the third quarter of the year--at approximately the same time the Senate Finance Committee was considering H. R. 34. These were the first bonds issued by the United States since 1825, and the only interest-bearing Federal securities then outstanding, except the current year's treasury notes, which, because of their extremely short term, would ordinarily be unsuitable for trust investment.

Bayley, The National Loans of the United States, (D-5), from which all the fiscal information in this discussion is taken, tells the sad subsequent history of the 1841 bond issue (p. 69):

> The loan proposed by the act of July 21, 1841 (5 Statutes, 438), owing to the short period which was to elapse before it became redeemable, does not appear to have met with much favor from those who had money to lend.27/
>
> Up to December 20, 1841, the amount received, of the $12,000,000 asked for, was only $5,532,726.88, while the estimated deficiency on January 1, 1842, was $627,557.90, and the estimated excess of expenditures over revenue for the year 1842 was $14,218,570.68. In this emergency the Secretary [of the Treasury] recommended an extension of the time within which the residue of the loan, not yet taken, should be redeemable, the reissue of the treasury notes heretofore authorized by law, and an increase of the duties on certain classes of imports. A bill to allow the issue and reissue of treasury notes was introduced in the House January 5, 1842, and met with much opposition. . . It finally passed both houses and was approved January 31, 1842 (5 Statutes, 469).

By the Act of April 15, 1842, c. 26, 5 Stat. 473, Congress amended the Act of July 21, 1841, to authorize a 20-year term for the bonds not yet sold, to permit them to be marketed under par, and to raise the ceiling on the issue to $17,000,000. Sales were still unsatisfactory; and by the Act of August 31, 1842, c. 287, 5 Stat. 581, Congress authorized the treasury to issue up to $6,000,000 of one-year notes in lieu of unsold bonds.

27/ See also excerpt from John Quincy Adams' diary for September 18, 1841 (quoted at page 61 of defendant's brief):

> . . . The secretary [of the treasury] has obtained one million, or a million and a half, of the twelve million loan authorized at a recent session of Congress, at five and a half per cent; but he wants already two millions more, and has no prospect of obtaining them at a rate lower than six per cent, if at all. . .

Thus the probable motive emerges for the Senate Committe's changing H. R. 34 from the negative form of a prohibition on the purchase of state bonds to the positive one of a command to buy Federal bonds. The Federal Government needed the trust money. Its bonds were selling poorly, while the Indian trust funds alone offered a captive market reported to be worth $3,381,303.03 on the very day H. R. 34 first passed the Senate.[28/]

The members of the Finance Committee, with their special expertise in public fiscal affairs, perhaps foresaw that the 1841 bond issue would be only the first of an indefinitely long series of similar borrowings. In the 132 years since Senator Calhoun addressed his question to Senator Evans, the Government has not once been out of debt. Federal bonds have always been available, although not always bearing 5 percent or greater interest.[29/]

28/ See S. Doc. 116, 27th Cong., 1st Sess. (1841) (D-20). The Committee had a precedent for its action. J. Perry, Trusts and Trustees, § 455 (3d ed., 1882), states:

> . . . It is said that the public policy in England of compelling trustees to invest trust funds in government funds originated largely in the necessities of the government, and the public advantage of creating a market and demand for government securities.

29/ U. S. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1957, at 711 (1960); 27 Encyclopedia Americana "United States," 660 (1967). Senator Calhoun's question to Senator Evans about what should be done if there were no Federal bonds to be had may have been disingenuous. Calhoun opposed the 1841 bond issue on the ground of its "establishing a system of permanent loans". 10 Cong. Globe 209 (July 22, 1841).

After short additional debate, H. R. 34, as amended by the Finance Committee, passed the Senate. On motion of Mr. Evans, the title was amended to delete the reference to prohibiting investment of United States funds in state stock.

H. R. 34 went back twice to the House, and to the Senate once more, before all differences were reconciled. The whole process took only two days. There was no conference. Significantly, the second section of the bill, applicable to the Indian trust funds, was never changed from the time the Senate Finance Committee first reported it. See House Journal, 27th Cong., 1st Sess., 448, 452, 470, 491, 497, 510, 515, 516 (D-33); Senate Journal, id., 233, 248, 250, 253-258 (D-36).

The legislative history is thus consistent with the plain language of the Act of September 11, 1841. Congress was telling the executive officers to take all the uninvested trust moneys they had at their disposal, even the accumulations of interest, and buy Federal bonds. The legislative history gives no support to the defendant's interpretation that the act applies only to funds independently required to be invested, by treaty or some other law.

E. Administrative construction--a history of lawlessness.

Nevertheless, the defendant insists, administrative construction supports its interpretation of the Act of September 11, 1841. We do not admit that administrative construction could prevail over the plain language of such an unambiguous statute. Louisville & Nashville Northern R. R. v. United States, 282 U. S. 740, 759 (1931). We have, however, examined the evidences supplied by both parties of administrative construction between 1841 and 1880. The following are representative samples:

August 25, 1845: Commissioner of Indian Affairs advises the Secretary of War that Act of September 11, 1841, forbids investment of Indian trust funds in state bonds (D-49).

January 29, 1847: Secretary of Treasury advises president of the Bank of Tennessee that 1841 act prohibits exchange of state bonds in Chickasaw trust for other state bonds (D-51).

July 1, 1851: President of United States exchanges Alabama bonds in Creek orphan fund for Virginia bonds (B-29).

October 1, 1851: Secretary of Treasury exchanges $185,000 worth of Alabama bonds in the Chickasaw trust fund for Tennessee, Missouri, and state-guaranteed railroad bonds (D-50).

March 21, 1853: Attorney General advises Secretary of Interior that he may invest Wyandot funds in state stock despite treaty provision requiring investment in Federal stock (B-8). Before opinion is published, it is revised to delete reference to state stock and to cite 1841 act as requiring investment in U. S. stock bearing not less than 5 percent interest (D-58, 6 Op. Att'y Gen. 2).

November 26, 1853: Commissioner of Indian Affairs calls for funding Indian annuities and investing in state bonds (B-9).

June 24, 1854: Attorney General advises Secretary of Interior that 1841 act requires all funds held in trust by the United States to be invested in Federal bonds (B-10).

August 10, 1854 - November 30, 1857: Some time during this period Secretary of Interior invests $315,000 of Kaskaskia, Peoria, Piankeshaw, and Wea trust fund in state bonds. See Treaty of May 30, 1854 (proclaimed August 10, 1854), 10 Stat. 1082, and Commissioner of Indian Affairs Annual Report for 1857 (B-14).

November 27, 1861: Commissioner of Indian Affairs, apparently completely ignorant of 1841 act, calls in annual report for enactment of a law "that all Indian funds hereafter committed to the United States for investment shall be invested in United States stocks only" (B-16).

July 1, 1863: Commissioner of Indian Affairs invests $26,000 of Indian trust funds, proceeds of matured Kansas bonds, in new Kansas bonds (D-81).

1863: Secretary of Interior sells at a premium $516,208.50 of Federal and state bonds in Indian trust portfolios and reinvests $497,850 of the proceeds in United States bonds (D-81).

September 2, 1876: Secretary of Interior informs J. & W. Seligman, stockbrokers of New York, that he is forbidden by 1841 act from investing Indian trust funds in United States four and one-half percent bonds (B-25).

October 31, 1876: Annual Report of Commissioner of Indian Affairs for Year 1876 (pages 275-77; <u>see</u> D-85) reveals $3,033,566.66 of state securities, all but $281,666.66 of these purchased or acquired by exchange after September 11, 1841, are held in Indian trust portfolios. All the issuing States except Kansas ($41,600 held) are in arrears on interest.

February 14, 1878: Secretary of Interior informs Senator Ingalls that he is obliged by existing law to reinvest proceeds of redemption of United States bonds held in the Indian trust funds in other United States bonds (B-26).

March 27, 1878: Acting Secretary of Interior in a letter to the chairman of the House Committee on Indian Affairs cites section four of act of January 9, 1837, c. 1, 5 Stat. 135, as authority to invest Indian trust funds "in any manner which shall be in his judgment most safe and beneficial". He does not mention 1841 act, which superseded section four of the 1837 act (B-27).

April 10, 1878: Secretary of Interior informs chairman of the House Indian Affairs Subcommittee that he is obliged by act of 1841 to invest proceeds of mature state and Federal bonds in United States bonds (B-28).

June 6, 1878: Attorney General refers to exchange in 1851 of state bonds in the Creek fund for other state bonds as an error of the President (B-29, 16 Op. Att'y Gen. 31, 37).

May 27, 1879: Duncan Thompson, identified by plaintiffs as Solicitor of Interior Department, advises Secretary that Secretary has no authority to sell bonds in the Indian trust funds without a special act of Congress. Also advises that it would be illegal to purchase 4 percent Federal bonds for the Indian trust even though they yield more than available 5 percent Federal bonds, due to premium on the latter (B-32). (Actually, Mr. Thompson was a clerk in the Indian office.)

June 23, 1879: Secretary of the Interior buys 4 percent bonds for the Indian trust funds (B-344, D-86).

The foregoing history does not show any consistent administrative construction of the Act of September 11, 1841. It shows instead that the administrators sometimes observed the law and sometimes did not.

After carefully examining all the legislative and historical materials submitted by both parties, we are more convinced than ever that the Act of September 11, 1841, meant exactly what it said.

F. The 1841 act became a lost law as a result of recodification.

The frequent administrative ignoring of the 1841 act was not helped by recodification. In 1873, Section 2 of the act became section 3659 of the Revised Statutes and was buried in the title dealing with the public moneys. The fourth section of the Act of January 9, 1837, although clearly superseded by the 1841 act, was not deleted, but carried forward as section 2096 in the title of the Revised Statutes dealing with Indians. When the United States Code was compiled in 1926, the 1841 act was dropped entirely, although it has never been repealed; 30/ but the fourth section

30/ A note in the United States Code Annotated states that it was omitted as superseded by 31 U. S. C. § 547, entitled "Disposition of trust funds received from foreign governments for citizens of United States". This note does not appear in the official edition, and is obviously incorrect. *See* 44 Stat. 1010.

of the 1837 act appears to this day, in the title on Indians, as 25 U.S.C. § 158. In the 1931 edition of the Code, the 1841 act was restored, as 31 U.S.C. § 547a in the title on Money and Finance. Since the word "Indian" does not appear in the 1841 act, it is small wonder that in application to the Indian trust funds it has become, in effect, a lost law.

In American jurisprudence, however, a statute is not repealed by being forgotten, and must be enforced when rediscovered. District of Columbia v. Thompson Co., 346 U. S. 100 (1953). As Justice Story stated in Vidal v. Girard's Executors, 43 U. S. (2 How.) 127, 196 (1844):

> . . . It is no proof of the non-existence of equitable rights that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

IV. 1880 to 1918: INDIAN TRUST FUNDS DEPOSITED IN THE TREASURY

In the late 1870's, five percent United States bonds became more and more difficult to get as the Civil War issues matured or were called. In 1877, the Treasury sold a new issue at par with a four and one-half percent coupon; in 1878, it sold four percent bonds at a slight premium. To stay within the letter of the 1841 law, the Secretary of the Interior had to waste the principal of the Indian trust funds paying premiums as high as 19-3/4 percent to replace called bonds with the few 5 and

and 6 percent governments still outstanding. These had less than five years to run until maturity, or were already in the call period. 31/

In 1876, Secretary Zechariah Chandler asked Congress to authorize deposit of the Indian trust funds in the treasury, at 5 percent interest, in lieu of investment. Congress did not act. In 1879, when Carl Schurz was Secretary, the Interior Department quit trying to comply literally with the 1841 act and purchased 4 percent United States bonds. The Acting Secretary stated that the net yield to the Indians was higher than on outstanding 5 percent issues after payment of the premium. 32/

There is no doubt that Secretary Schurz correctly interpreted the 1841 act. The primary purpose of the lawmaker overrides inconsistent clauses. 2 J. Sutherland, Statutory Construction, §§ 4704, 4932. The primary purpose of Congress in 1841 was to require that all funds held in trust by the United States be invested in Government bonds, not that they be invested at 5 percent. Indeed, if obtaining 5 percent had been Congress's primary purpose, there would have been no need for the 1841 act, since the 1837 act already provided for this minimum

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31/ See letters of Secretaries of the Interior Chandler and Schurz reprinted in S. Rept. 186, 46th Cong., 2d Sess. (1880) (B-36); Annual Reports of the Commissioner of Indian Affairs for 1874 (page 457), 1875 (page 144), and 1876 (page 256) (Ex. D-83, D-84, and D-85); and R. Bayley, National Loans of the United States (D-5), pages 164-171 (1880).

32/ S. Rept. 186, supra, also in B-34. See also Secretary Schurz to Secretary of the Treasury, February 8, 1879 (B-30).

rate. The obligation to invest the trust funds, therefore, survived the extinction of 5 percent bonds.

Congress, however, soon resolved Secretary Schurz's dilemma. The act of April 1, 1880, c. 41, 21 Stat. 70, read as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.

The 1880 act was the first general legislation authorizing the deposit of Indian trust funds in the U. S. Treasury at interest; but many such funds had been deposited there earlier and were drawing interest under the authority of treaties, special legislation, or annual appropriation acts. The Annual Report of the Commissioner of Indian Affairs for 1879 (D-86) pages 309-10, shows $8,229,511.57 in Indian funds "held in trust by the government in lieu of investment" at 5 percent interest, while the funds invested in bonds totalled only $5,180,066.83.

By its plain language the 1880 act does certain things and does not do others:

First, it makes deposit at interest an optional alternative to investment for certain trust moneys. It does not abolish investment in favor of deposit as the sole method of administering the Indian trust funds. The "best interests of the Indians" is the test for whether the funds are to be deposited or invested.

Second, the 1880 act applies to certain specified Indian trust moneys only. These are:

(1) Proceeds of redemption of the securities held in the trust funds in 1880.

(2) Proceeds of sales of lands ceded by the Indians.

(3) Proceeds of sales of the four percent Government bonds purchased in 1879.

See S. Rept. 186, 46th Cong., 2d Sess., 2 (1880) (B-36).

Third, it does not repeal the 1841 act. The direction of that statute to invest remains mandatory as to the trust funds not covered by the 1880 act, and optional as to those which are covered.

Incidentally, the act legalized the Secretary's 1879 purchases and authorized him to sell them if he needed special authority to do so, as his adviser, Duncan Thompson, thought.

The 1880 act directs the payment of interest on the deposits, but does not set the rate. Instead, it adopts the rates fixed by treaties or "by law". The legislative history clearly shows what the latter phrase means. It means 5 percent.

The Committee on Indian Affairs reported out, and the Senate took up on January 7, 1880, the bill (S. 605) to authorize the Secretary of the Interior to deposit certain funds in the United States Treasury in lieu of investment. There was no written report. As amended by the committee, the bill read as follows (40 Cong. Rec. 212, B-35):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to deposit to the credit of the proper nation or tribe, in the Treasury of the United States, any or all sums belonging to the Indian trust fund now held or which may hereafter be received by him as Secretary of the Interior and trustee of various Indian tribes, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits in lieu of investments; and the United States shall pay interest thereon semi-annually at the rate per centum which is required by treaty stipulation or by act of Congress, or, in cases where the rate is not stipulated, at 4 per cent., from the respective dates of deposit; such payments to be made in the usual manner, as each may become due, without further appropriation by Congress.

Substantial debate ensued, in the course of which Senator Allison said (p. 213):

> As I understood this bill it simply provides that where money comes into the Treasury, by the payment of bonds or otherwise, it shall be deposited in the Treasury and draw the rate of interest prescribed in the treaties with the several tribes, if a special rate is prescribed. There are some treaties where no rate is fixed, but in 1855 it was provided by law that where there was no special treaty stipulation the rate should be 5 per cent.

There was no such law passed in 1855. Mr. Allison seems to have been alluding to the 1841 act.

Senator Conkling said (<u>ibid</u>.):

> . . . I wish the Senator would explain the effect of the words: "Or in cases where the rate is not stipulated, at 4 per cent. from the respective dates of deposit." What is to be the operation of this act upon a treaty which names no rate of interest, but which was made leaving that rate blank after an act of Congress had been passed declaring in all such cases it should be 5 per cent? What is the reason, in other words, that, in effect, that is not a treaty stipulation? . . . and if so, upon what principle is it, if we intend to observe treaty stipulations, that we propose this morning to declare that in all such cases hereafter the rate shall be not 5 per cent., but 4 per cent.?

Senator Edmunds said that the bill appeared to require the Secretary of the Interior to deposit accruing interest in the Treasury at interest. He added (p. 214):

> . . . The United States ought not to undertake to pay interest on these temporary deposits which are merely the interest belonging to the Indians and which by treaty stipulation we were not bound to pay interest on at all, but only to pay over through the Secretary of the Interior to the Indian tribes or for its benefit according to the stipulations of the respective treaties.

Mr. Edmunds appears oblivious of the 1841 act.

The bill was passed over.

When it came up again, on February 5, Senator Pendleton, by direction of the Committee on Indian Affairs, moved a substitute, stating that the Committee had endeavored to meet the objections of Senators Conkling and Edmunds. The substitute bill, which was adopted, is in the exact language of the present act. The reference to four percent interest was out; as well as the reference to "any or all sums belonging to the Indian trust fund." The bill was accompanied by a report, No. 186, 46th Cong., 2d Sess. (B-36), which quotes verbatim the Revised Statutes versions of both section 2 of the 1841 act and section 4 of the 1837 act. These sections expressly mention 5 percent interest.

The report came after too long an interval to have much weight in determining the true meaning of either act; but it does show that the Senate of 1880 thought that the United States was required by statute to obtain interest at the rate of 5 percent on all existing Indian trust funds, except where otherwise provided by treaty. Cf. Rainwater v. United States, 356 U. S. 590, 593 (1958); Sioux Tribe v. United States, 316 U. S. 317, 329 (1942).

The Indian Affairs Committee's effort to meet Senator Edmunds' objection to the earlier version of S. 605 resulted in a substantial gap of coverage in the 1880 act. Thus, all the invested Indian trust funds existing in 1880, regardless of their source, were authorized to be deposited in the treasury at interest; but the only new money that could be so deposited was proceeds of sales of ceded Indian lands to third parties. The 1880 act's coverage did not extend to sums received by Indian tribes after 1880 from any other source. Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171, 176-81 (1972).

The General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, partially filled the gap.

This law provided for dividing the reservations into parcels ranging in size from 40 to 320 acres, and alloting the parcels to individual

Indians as their private property. Upon completion of the allotment of a reservation, the Indians were to become citizens of the United States and subject to the civil and criminal laws of the state or territory where they resided.

Section 5 of the General Allotment Act authorized the Secretary of the Interior to negotiate with the tribes to buy the parts of their reservations left over after allotment, the so-called "surplus lands." Actual sales to the United States were to be made by formal agreements requiring the ratification of Congress to become effective. Section 5 further provided (24 Stat. 390):

> And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

The reason for the low interest rate was explained by Senator Dawes, the original sponsor of the allotment bill, popularly called the Dawes Act, when he presented the conference report (18 Cong. Rec. 974, January 25, 1887) (D-98):

> The other change is the difference between 5 per cent. and 3 per cent. interest. Five percent. is the uniform rate of interest paid for Indian funds, and the answer to that on the part of the House was that that rate was established at a time when all interest was at that high rate; all interest now is at 3 per cent. and less, and they insisted upon those two amendments, and the Senate yielded.

The three percent provision of the Allotment Act applies only to moneys paid by the United States itself for the purchase of "surplus" reservation land pursuant to agreements negotiated under authority of the same Allotment Act.

There is not merely an absence of overlap between the 1880 act and the General Allotment Act, but a gap between them. Prior to 1929 there would appear to be no general law authorizing the Treasury to pay interest on the proceeds of any sales of Indian land, except of those held in trust by the United States for the purpose of sale, and of those sold directly to the United States pursuant to the Dawes Act. Direct sales to the United States under other authority, for example, under flood control project legislation, would not be covered. Similarly, such direct sales to third parties as might be authorized by special acts of Congress would not be covered. Revenues from sources other than land sales were not covered.

As to Indian tribal moneys not covered by either the 1880 act or the General Allotment Act, if the Government undertook to hold them in its custody, the unrepealed mandate of the 1841 act applied. It continued to require such trust funds to be invested in United States bonds.

V. THE IMPL FUND: 1883 - 1930

During the course of the nineteenth century, as the Federal Government assumed increasing control over the internal affairs of the Indian tribes, its agents began collecting the miscellaneous revenues of the reservations. They collected the proceeds of sale of articles made and crops raised by the Indians; fees paid by white people for pasturing cattle or otherwise using reservation lands; proceeds of sales of hides from slaughtered Indian cattle and of reservation timber, sawed lumber, and other wood products; royalties on coal; fines levied on Indians by the Courts of Indian Offenses; and moneys from numerous other sources. Prior to 1876 the agents were not required to report these collections to Washington. In that year, the Indian Office undertook an investigation of what became of such funds, and asked an opinion of the Treasury Department as to whether they were public moneys. The Secretary of the Treasury ruled that they were not, and could not be deposited in the Treasury.

As a result, the Interior Department ordered the Indian agents in the field to retain and account for these funds, and expend them only upon the personal direction of the Commissioner of Indian Affairs. Moneys representing the proceeds of labor of individual Indians were ordered to be expended for such individuals' own benefit. 33/

This system of handling the miscellaneous revenues was not a success; and Congress, by a pencilled rider on the deficiency appropriation bill of March 3, 1883, c. 141, 22 Stat. 590, enacted as follows:

33/ See letter of February 21, 1881, Acting Chief Clerk, Office of Indian Affairs, to Secretary of Interior (in exhibit D-64), and letter of March 20, 1883, Commissioner of Indian Affairs to Secretary of the Interior (D-65).

> 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 covered 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.

We have found no legislative history of the quoted paragraph, which we shall refer to hereinafter as "the 1883 act". Both parties agree, and we agree, that its purpose was improved fiscal control (pl. brief, p. 27; def. brief, p. 98). The 1883 act is similar to the first section of the Act of January 9, 1837, discussed in Part II of this opinion. That section, a part of the 1837 act not superseded by the 1841 act, required the proceeds of sales of Indian land ceded in trust by treaty to be paid into the treasury prior to disbursement to the Indians or investment for their benefit. 34/ The 1883 act extended the familiar pattern of centralized accounting to the proceeds of reservation products.

The treasury misnamed the new fund "Indian Moneys, Proceeds of Labor", abbreviated "IMPL", omitting the word "not" between "Moneys" and "Proceeds", perhaps by clerical error.

34/ "Covered into the Treasury" and "paid into the Treasury" are synonyms. Rice v. United States, 21 Ct. Cl. 413, 419-420 (1886), aff'd by equally divided court, 122 U. S. 611 (1887), quoted with approval in United States v. Johnston, 124 U. S. 236, 253 (1888).

No interest was paid on the IMPL fund until the Act of June 13, 1930, c. 483, 46 Stat. 584, expressly required its segregation on the books of the treasury into separate accounts for the respective tribes, and payment of 4 percent annually from July 1 of that year on each account with a balance exceeding $500. Previously there was only a single fund in the treasury, the books showing each tribe's share being kept in the Indian Office.

We have found no earlier provision for paying interest on the IMPL account, and conclude that the treasury acted lawfully in not crediting it with interest during the period between 1883 and 1930.

The plaintiffs contend that the Act of September 11, 1841, 31 U. S. C. § 547a (1970), applied to the IMPL fund. That act does not direct the Government to pay interest on trust funds, but rather to invest them. In fact, the IMPL fund was not invested, buy lay idle in the treasury for 47 years.

There is nothing inconsistent between the 1883 act's requirement for covering the IMPL moneys into the treasury and the 1841 act's requirement for investment. During the nineteenth century, being covered into the treasury at Washington was the normal prerequisite to investment of Indian trust funds collected in the field. Indeed, we are not aware that any such funds were invested at the field level during the latter half of the century.

Section 2 of the 1837 act, which governed the proceeds of sale of trust lands (required to be paid into the treasury by section 1) provided as follows (5 Stat. 135):

> . . . all sums that are or may be required to be paid, and all moneys that are or may be required to be invested by said treaties, are hereby appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President.

From the absence of similar language in the 1883 act it may be inferred that the IMPL funds were to stay in the treasury, pending later appropriation by Congress. The Acting Secretary of the Treasury in a letter to the Secretary of the Interior dated November 26, 1883, (D-71), took the position that they could not be paid out without further legislation. The question of whether they could be invested without further legislation was not before him, and he expressed no opinion on it.

In fact, the legal situation in regard to investing the IMPL funds was markedly different than in regard to spending them. If they were trust funds, authority to invest already existed.

Earlier in this opinion we have determined that the 1841 act was self-executing, as against the defendant's contention that it operated only on funds required to be invested by some other law. The act meant what it said.

When Congress used the word "all" it did not mean "some". The language and legislative history of the 1841 act no more support an implied exclusion from coverage of future Indian trust funds than they do for those existing in 1841 which were not otherwise required to be invested. The usual rule of prospective operation applied to the 1841 act. The rule is stated thus in 2 J. Sutherland, Statutory Construction, § 5102 at 509 (3d ed., 1943):

> Standards established by the medium of legislation are usually intended to have considerable breadth with the result that a statute may cover many situations that do not immediately occur to the mind. And so it is a general rule of statutory construction that a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of enactment, but also prospectively to things and conditions that came into existence thereafter.

Further, we see no reason why the 1841 act should not operate on funds held in trust by the United States in its treasury to the same extent as on trust funds held elsewhere. The mention in the 1841 act of one exception to its applicability, viz., the clause "when not otherwise required by treaty", implies that there are no other exceptions. 2 J. Sutherland, Statutory Construction, § 4915, note 6 at 413 (3d ed., 1943); cf. Smith v. Stevens, 77 U. S. (10 Wall.) 321 (1870).

If an appropriation were necessary to get the IMPL funds invested, the 1841 act would serve the purpose, provided they were trust funds.[35/] Article I, § 9, Clause 7 of the United States Constitution[36/] requires no special formula for an appropriation; and Congress did not provide

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35/ A separate appropriation would have been necessary before the so-called trust funds mentioned in footnote 14 could be invested, since these were wholly fictitious. Their principal amounts had never been severed from the general fund in the treasury. They were mere unfulfilled promises of the United States to put up certain moneys. Moreover, by annually appropriating interest and refusing to appropriate principal although repeatedly requested to do so, Congress showed its intention that these imaginary funds were not to be invested, prior law, if any, to the contrary notwithstanding.

The IMPL fund, on the other hand, like the various Indian proceeds of lands funds in the treasury, represented actual moneys of the Indians paid into the treasury from outside sources. It did not have to be severed from the general fund, since it did not derive from the general fund and was not intermingled with the general fund, always being carried in a separate account.

36/ "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

There is a split of authority on whether this clause applies to trust funds. Stitzel-Weller Distillery v. Wickard, 73 App. D. C. 220, 118 F. 2d 19 (1941), held it did. Emery v. United States, 186 F. 2d 900 (9th Cir.), cert. denied, 341 U. S. 925 (1951), held it did not. See also United States v. Johnston, 124 U. S. 236, 253 (1888).

such a formula until after 1841,[37/] thus confirming that none was required before.[38/]

It is not necessary, however, to construe the 1841 act as an appropriation, since it did not require any funds to be drawn out of the treasury. The 1837 act contemplated the purchase of state bonds, which would normally involve disbursement of the price. The 1841 act on the other hand required the purchase of Federal bonds, which

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37/ See 31 U. S. C. § 627 (Act of June 30, 1906, c. 3914, § 9, 34 Stat. 764).

38/ The language of section 2 of the 1841 act is quite similar to section 4 of the Act of June 14, 1836, discussed in Part I of this opinion, which reads as follows (5 Stat. 47):

> . . . the Secretary of War be and he is hereby authorized and directed to invest, in a manner which shall be, in his judgment, most safe and beneficial for the fund, the sum of thirty-three thousand nine hundred and twelve dollars and forty cents, being money in the Treasury as the proceeds of lands purchased from the Seneca Indians of Sandusky by a treaty concluded on the twenty-eighth day of February, eighteen hundred and thirty-one, from the Senecas and Shawanese by a treaty concluded on the twentieth of July, eighteen hundred and thirty-one, and from the Shawanese, by a treaty concluded on the eighth of August, eighteen hundred and thirty-one, and upon which sum the United States are, by stipulations in the said treaties, bound to pay to the said Indians an annual interest at the rate of five per centum per annum; Provided, That the said Secretary shall make no investment of the said sum, or any portion of it, at a lower rate of interest than five per centum per annum.

Despite the lack of the word "appropriate" in the section, the Seneca and Shawnee funds were withdrawn from the treasury under its authority and invested in state stocks. See D-41.

necessitated only a bookkeeping operation within the treasury--debiting the price of the bonds to the trust account and crediting it to the general fund. By 1883, due to recent legislation,[39/] even the bonds would remain in the physical custody of the treasury.

We reject the proposition that the 1883 act was somehow inconsistent with the 1841 act and authorized the IMPL fund to lie idle even if it was a "fund held in trust by the United States".

39/ Act of June 10, 1876, c. 122, 19 Stat. 58. The text follows:

> CHAP. 122--An act transferring the custody of certain Indian trust-funds
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> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: Provided, That nothing in this act shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may now be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the custody of said bonds and the collection of interest thereon as hereinbefore mentioned.

Although the Commissioner of Indian Affairs promptly asked for legislation authorizing him to withdraw and spend the IMPL moneys, Congress acted only four years later, after being prodded by a message from the President. Sen. Ex. Doc. 107, 49th Cong., 1st Sess. (D-73). A floor amendment to the appropriation act of March 2, 1887, c. 320, 24 Stat. 463, was adopted, providing as follows:

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

Presenting the amendment, Congressman Perkins stated (18 Cong. Rec. 376 (January 5, 1887) (B-40):

> . . .This is prepared by the Commissioner of Indian Affairs, and is recommended by the Secretary of the Interior. It is also recommended by the President. The object, as I have already suggested, is simply to amend the act of 1883, so that this fund can be paid out for the benefit of the Indians to whom it belongs upon the orders of the Secretary of the Interior. . .

There is nothing in the 1887 amendment inconsistent with investment of such part of the IMPL fund as was not paid out of the treasury.

If the IMPL fund in the treasury was a trust fund, from 1887 on there were two harmonious statutes operating upon it. The 1887 act authorized the Secretary to withdraw the money in order to use it for the tribes' benefit; and the 1841 act commanded the money not so withdrawn, and the annual interest accruing thereon, to be invested in Government bonds.

It can be argued that the 1887 act authorized expenditure of principal but not interest on the IMPL fund. We are not convinced that this construction is correct.[40/] Assuming that it was, however,

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40/ "Interest goes with the principal, as the fruit with the tree." Cf. Himley v. Rose, 9 U. S. (5 Cranch) 311, 319 (1809) (dissenting opinion of Johnson, J.).

As noted in Part III, A, of this opinion, several treaties creating trust funds contained no express investment provisions. Typical language creating such a fund appears in Article 5 of the Kansas treaty of June 3, 1825, 7 Stat. 245:

> . . .thirty-six sections of good lands, on the Big Blue river, shall be laid out under the direction of the President of the United States, and sold for the purpose of raising a fund, to be applied, under the direction of the President, to the support of schools for the education of the Kansas children, within their Nation.

When such trust funds were invested, interest was applied to the objects of the trust without further legislation, presumably on the authority of the quoted maxim.

In any event, an appropriation would not have been necessary to get interest on the IMPL fund out of the treasury. In the absence of an authorizing statute, like the 1883 act applicable to principal, the interest could not have been covered into the treasury in the first place. The act of June 10, 1876 (quoted above in note 39), provided that interest on stocks and bonds in which Indian trust funds were invested be deposited in the Treasury of the United States and a certificate of deposit therefor issued to the Secretary of the Interior. For the distinction between moneys "covered into" the treasury, which could not be withdrawn without appropriation, and moneys "deposited with the Treasurer," which could be, see United States v. Johnston, 124 U.S. 236, 253 (1888).

if the IMPL fund had been invested and the interest, accumulating beyond the Secretary's power of withdrawal, had been needed for the Indians, remedial legislation would doubtless have been obtained.

The 1887 floor amendment was written in the Interior Department, by administrators who had a history of overlooking the 1841 act, and adopted by Congress with minimal consideration. Neither in the debate nor in any of the executive correspondence brought to our attention is the 1841 act even mentioned. Clearly the 1887 amendment was not intended to repeal it or construe it. Certainly the 1887 amendment did not supersede the 1841 act's mandate that surplus income be reinvested. The only effect of the amendment was to make provision for expenditures from the statutory IMPL fund similar to the treaty provisions which authorized expenditures from the earlier trust funds. After 1887 the 1841 act continued to apply to both principal and interest of the IMPL fund in the treasury. It ceased to apply only to those parts of the fund lawfully withdrawn from the treasury by the Secretary of the Interior, that is, to those moneys withdrawn from the fund which he actually put to use for the benefit of the Indians.

Was the IMPL fund "held in trust by the United States" within the meaning of the 1841 act?

In Part III of this opinion, we have reviewed all the Indian trust funds in existence in 1841--funds which the defendant concedes were covered--and found widely varying degrees of formality in their creation. No particular formality or technicality was required to bring a fund within the purview of the act in 1841; and we can see no reason for applying a more strict rule thereafter.

As we have also noted, the bill which became the 1841 act was routed through the House Ways and Means Committee and the Senate Finance Committee, the two chambers' fiscal committees, rather than their Indian Affairs Committees. In both House of Representatives and Senate the reporting committee's objective was a financial one of sweeping character. In the House, it was to stop further investment of Federal funds, whether of public or trust nature, in state stocks. In the Senate, it was to obtain use of trust funds for the Government itself, to help meet its unending need to borrow money and to firm up the market for its bonds. Such objectives militate for an inclusive definition of "funds held in trust by the United States".

Needless to say, we believe the definition should be no more nor less broad now that the Indians are requesting their lost income, than it was in 1841 when the Government needed their money.

In the absence of a definition in the statute, we look for the definition of the legal term "trust" to sources which would reflect the common understanding among the legal profession of the time, that is, to such sources as the legislators of 1841 would have looked to. 2 J. Sutherland, Statutory Construction, § 4919, at 438 (3d ed., 1943); cf. United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 12, 411 F. 2d 1255, (1969), answering certified question in Docket 285, 19 Ind. Cl. Comm. 140 (1968).

Joseph Story, at the same time justice of the Supreme Court of the United States and professor of law in Harvard University, was preeminently authoritative on the American law of the first half of the 19th Century. He defined "trust" thus, in his Equity Jurisprudence, § 964 (1836):

> A Trust, in the most enlarged sense, in which that term is used in English Jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others. The legal estate in the thing is thus made subservient to certain uses, benefits or charges in favor of others; and these uses, benefits or charges constitute the Trusts, which Courts of Equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary.

In section 980 Story wrote:

> . . . Express Trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not, that in those cases,

> the language of the Instrument need point out the very nature, character and limitations of the trust in direct terms, ipsis verbis; for it is sufficient if the intention to create it can be fairly collected upon the face of the instrument from the terms used; and the trust can be drawn, as it were, ex visceribus verborum. 41/

Quoting a New York case decided in 1823, Justice Levi Woodbury, the former Secretary of the Treasury and Senator, wrote for a unanimous Supreme Court in Benham v. Taylor, 46 U. S. (5 How.) 233, 274 (1847):

> So, "every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust."

See also Burnell v. United States, 44 Ct. Cl. 535 (1909).

J. Perry, A Treatise on the Law of Trusts and Trustees, § 13 (3d ed. G. Choate, 1882), the latest American treatise on trust law available when Congress passed the act of March 3, 1883, shows that the concept was the same at that time. In § 41 Perry stated that the United States and each of the separate states may be a trustee, although equity could not enforce the trust against sovereigns, adding:

> . . . A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused. 42/

41/ Story is quoted from the first edition, published in 1836. The second edition, published in 1839, which was the most recent at the time Congress enacted the act of September 11, 1841, makes no substantive change in these passages.

42/ See also, Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844); T. Lewin, Practical Treatise on the Law of Trusts and Trustees 84-85 (1st ed., 1837); Restatement (Second) of Trusts § 95 (1959).

Perry expressly mentions the Smithsonian Fund (on page 30) as an example of the United States as trustee.

The above quotations are consistent with applicable definitions of trusts in other texts of the 19th century and appear identical in concept with the modern view of trusts.[43/]

The American Law Institute, Restatement of the Law of Trusts (1935) was cited by the Supreme Court among the controlling authorities in the Indian trust case of Seminole Nation v. United States, 316 U. S. 286, 296 (1942). Section 2 of the Restatement defines a trust as follows:

> A trust, as the term is used in the Restatement of this Subject, when not qualified by the word "charitable", "resulting" or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

43/ See J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union, "Trusts" (1st ed., 1839); J. Willis, Practical Treatise on the Duties and Responsibilities of Trustees 2 (reprinted in Philadelphia, 1835, from the London edition of 1827). Other authors of the period adopt Lord Coke's mediaeval definition of "use" which is applicable only to real estate, although T. Lewin, Practical Treatise on the Law of Trusts and Trustees (1st London ed., 1837, reprinted in Philadelphia 1839), 295, states "trusts of chattels personal are of the most frequent occurrence."

The Introductory Note to the Second Restatement of Trusts (1959), states:

> . . . In spite of the merger of courts of law and equity in England and in most of the American states in the nineteenth century, the distinction between legal interests and equitable interests still persists, and in its essentials the law of Trusts is not changed.

> Comment:
>
> a. Terminology. The term "express trust" is used to indicate a trust as here defined whenever it is desirable to emphasize the contrast between a trust as here defined on the one hand and a resulting trust or a constructive trust on the other hand.

To create an express trust it has never been necessary to state, "I hereby create an express trust." The Restatement continues:

> § 24. Mode of Manifestation of Intention
>
> (1) Except as otherwise provided by statute, the manifestation of intention to create a trust may be made by written or spoken words or by conduct.
>
> (2) No particular form of words or conduct is necessary for the manifestation of intention to create a trust.
>
> Comment:
>
> * * * * * * *
>
> A trust may be created although the settlor does not use the word "trust," and the fact that the settlor uses the word "trust" does not necessarily indicate that a trust is intended.....
>
> Illustrations:
>
> 1. A, the owner of certain bonds, declares that he holds the bonds "for the use of B" or "for the benefit of B." In the absence of evidence of a contrary intention, A holds the bonds in trust for B.

In our view the IMPL fund passes the strictest test for an express trust.

The United States held the Indians' land in trust. The various revenues which made up the IMPL fund arose as a result of the Government's administration of this land trust. Indeed, most of them arose directly from the land, as mining royalties, grazing fees, considerations for grants of rights of way, and stumpage for timber growing on the land. The Government clearly had legal title to the money as well as the land. Cf. United States v. Brindle, 110 U. S. 688, 693 (1884); Confederated Salish and Kootenai Tribes v. United States, 175 Ct. Cl. 451 (1966), cert. denied, 385 U. S. 921 (1966).

The Government, however, expressly acknowledged that the Indians were the equitable owners of the fund.

The first acknowledgment was in the act of 1883, which stated that the moneys covered into the treasury should be "for the benefit of such tribe" (22 Stat. 590).

The second was in the Message of President Grover Cleveland to the Congress of May 18, 1886, recommending action to enable the Secretary of the Interior to withdraw and use moneys from the IMPL fund. President Cleveland quoted the Commissioner of Indian Affairs as follows (S. Ex. Doc. 107, 49th Cong., 1st Sess.--D. 73):

> The evil complained of is the dissatisfaction of certain Indians because they are deprived of money which is rightfully theirs. . . .
>
> The complaints of the Indians are just.
>
> It is not disputed that this money belongs to them, nor is it disputed that it was the intention of Congress, as expressed in the act of March 3, 1883, that they should have the benefit of it.

And the third acknowledgment was by the act of March 2, 1887, which authorized use of the IMPL moneys "for the benefit of the several tribes on whose account said money was covered in . . ." (24 Stat. 463).

Thus, all requirements for an express trust of the IMPL fund are met.

We are aware that the Supreme Court, in Chippewa Indians v. United States, 307 U. S. 1, 3 (1939), stated that an interest-bearing fund in the U. S. Treasury, created by statute for the benefit of Indians from the proceeds of sale of their ceded lands, was not a "technical trust". In our opinion this case has no bearing on whether the IMPL fund was "held in trust by the United States" within the meaning of the 1841 act.

In the Chippewa case, appellants contended that the beneficiary of the fund was not the tribe but individual Chippewas. Those living during the 50-year duration of the trust, appellants claimed, were income beneficiaries, and those living at the expiration were remaindermen. Since the "remaindermen" never consented and, being unascertainable in advance, could not consent to various changes in the trust terms which had resulted in expenditures from principal, appellants contended the United States was bound to restitution under "plain principles of equity". Appellants did not deny that the expenditures were for the benefit of the Indians.

The court held the Chippewa fund was not "a strict and conventional trust for classes of individual Indians", but a tribal fund. It did not deny the fund's trust status, writing as follows (307 U. S. at 5):

> We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of tribal property for the benefit of its Indian wards.

The United States has probably never held a fund in strict and conventional trust for individuals. Certainly the Indian trust funds existing in 1841, to which the defendant concedes the act of that year applied, were not of such character. Indeed, as we have seen, several of them were created without authority of law.

In a word, the operation of the 1841 act was never intended to be limited to "technical" trusts.

Since the Government never lays aside its sovereign power, there are necessarily substantial differences between trusts administered by the United States and private trusts. The Government as trustee, for example, can lawfully borrow the trust moneys, by depositing them in its treasury or buying its own bonds, conduct which would be breach of trust in a private trustee. Menominee Tribe v. United States, 101 Ct. Cl. 10, 20 (1944). Congress may change the terms of an Indian trust, without liability if the change is beneficial to the cestui. Fort Peck Indians v. United States, 132 Ct. Cl. 373 (1955), aff'g, Docket 183, 3 Ind. Cl. Comm. 78 (1954).

But administrative officers of the United States may not change or disregard trust terms enacted by Congress. Work v. Mosier, 261 U. S. 352 (1923).

While the United States is not a technical or conventional trustee as known to private law, in regard to moneys it has undertaken to administer for Indians it is a fiduciary, bound to a standard no less exacting, if somewhat different, from that applicable to private trustees. United States v. Mason, No. 72-654 (U. S., June 4, 1973). As stated in Seminole Nation v. United States, 316 U. S. 286, 296-297 (1942):

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations

> of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

The treasury was slow to recognize the trust nature of the IMPL fund. With the same apparent unconcern by which they misnamed it, treasury officials misclassified the IMPL fund--as miscellaneous receipts and expenditures of the Indian Service--without acknowledgment of its trust status. See U. S. Treasury, Statements of Receipts and Expenditures, for fiscal years 1884 through 1907.

In 1908, without any public explanation, the treasury began listing the IMPL as a trust fund, and has continued to do so until the present time.

The reason for the change was as follows. In October of 1907, Secretary of the Treasury George B. Courtelyou submitted a list proposing classification of all accounts appearing in the detailed ledgers of appropriations in his office to the Comptroller of the Treasury, R. J. Tracewell, for review and approval. In an opinion dated December 14, 1907, the Comptroller advised the Secretary that all funds in the treasury should be grouped into three classes: (1) the general fund, (2) special funds, (3) trust funds. See Disposition of Customs Duties and Tonnage Taxes on Articles and Foreign Vessels Coming from the Philippine Archipelago. Three Funds in the Treasury Distinguished, 14 Comp. Dec. 361 (1907). The Comptroller proceeded to revise the Secretary's list in accordance with this decision, on the basis of "a very careful search of the statutes under which the large number of appropriations have been raised".

The Comptroller returned the list, with his corrections, attached to an unpublished decision dated June 13, 1908 (a copy is available for inspection in the law library of the General Accounting Office). The decision contains the words quoted above and the following definitions:

> Trust funds are (a) moneys or securities received from private parties, or as the proceeds of private property which the law authorizes to be received into the Treasury to be held for the use of such parties or to be applied to some designated object, or paid to some designated beneficiary or beneficiaries; (b) or moneys in the Treasury which Congress directs to be placed to the credit of private parties and held subject to future disposition for the use of such parties in payment for services or private property purchased; (c) or moneys in the Treasury directed to be credited to a particular fund for use in the discharge of some obligation assumed by the Government in relation to the subject matter giving rise to the creation of such fund out of moneys in the Treasury not otherwise appropriated.

The IMPL fund was classified as a trust fund in the accompanying list.

The Comptroller's decision of 1908 appears peculiarly significant as the first official ruling on the question of whether the IMPL was a trust fund. We have found no earlier decision denying the fund's trust status. Officials competent to make the determination appear simply never to have considered the question before 1908. The 25 year lag from 1883 is not, in point of fact, an unusually long period for questions of Indian-Government relations to await legal resolution.

There was no new legislation in 1908 affecting the IMPL fund and no change in its actual use. The Comptroller's decision and the

Secretary of the Treasury's implementation of it were thus only recognition of the true status of the fund from its beginning.

The IMPL fund has been consistently identified as a trust fund since 1908, by the Comptroller of the Treasury,[44] the Comptroller General,[45] and the Congress.[46] So far as we are aware, the defendant has not questioned the trust status of the IMPL fund until the oral argument in this case.

We conclude that Indian Moneys, Proceeds of Labor has always been a fund held in trust by the United States since its establishment in 1883. It, and the annual interest accruing thereon,[47] should have been invested in Federal securities pursuant to the act of September 11, 1841 (31 U.S.C. § 547a), except during periods when alternative means, authorized by later legislation, were used to make such moneys productive.

VI. 1918 TO PRESENT: TWENTIETH CENTURY STATUTES PROVIDE GREATER FLEXIBILITY FOR ADMINISTRATION OF THE INDIAN TRUST FUNDS

In 1918 a law was enacted authorizing the Secretary of the Interior

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44/ 17 Comp. Dec. 995 (1911); 16 Comp. Dec. 20 (1909).

45/ Letter to Secretary of Interior, February 11, 1926, quoted in H.R. Rept. 897, 69th Cong., 1st Sess. (1926--B-57); Decision A-27308, 8 Comp. Gen. 625 (1929).

46/ Permanent Appropriations Repeal Act, June 26, 1934, § 20, 31 U.S.C. § 725s(a) (20).

47/ In many cases accumulations of Indian trust fund interest are now being invested in United States securities. See Combined Statement of Receipts, Expenditures and Balances of the U. S. Government, Fiscal Year 1971, at 492-509.

to withdraw tribal trust funds from the Treasury and deposit them at interest in banks in cases where the United States was not obligated by law to pay a higher rate of interest than the banks offered. The same law authorized the Secretary to invest the trust funds of any tribe or individual Indian in United States Government bonds. See sec. 28, act of May 25, 1918, c. 86, 40 Stat. 591. The text of the section follows:

> SEC. 28. That the Secretary of the Interior be, and he is hereby, authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and segregate the common, or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States, and which are susceptible of segregation, so as to credit an equal share to each and every recognized member of the tribe except those whose pro rata shares have already been withdrawn under existing law, and to deposit the funds so segregated in banks to be selected by him, in the State or States in which the tribe is located, subject to withdrawal for payment to the individual owners or expenditure for their benefit under the regulations governing the use of other individual Indian moneys. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to withdraw from the Treasury and deposit in banks in the State or States in which the tribe is located to the credit of the respective tribes, such common, or community, trust funds as are not susceptible of segregation as aforesaid, and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks: Provided, That no tribal or individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate and shall have furnished an acceptable bond or collateral security therefor, and United States bonds may be furnished as collateral security for either tribal or individual funds so deposited, in lieu of surety bonds: Provided further, That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in United States Government bonds: And provided further, That any part of tribal funds required for support of schools or pay of tribal officers shall be excepted from segregation

> or deposit as herein authorized and the same shall be expended for the purposes aforesaid: Provided, however, That the funds of any tribe shall not be segregated until the final rolls of said tribe are complete: And provided further, That the foregoing shall not apply to the funds of the Five Civilized Tribes, or the Osage Tribe of Indians, in the State of Oklahoma, but the funds of such tribes and individual members thereof shall be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

The 1918 act enlarged the discretion of the Secretary of the Interior as to the manner in which he might make the trust funds productive. Prior to 1918 he could either invest in Government bonds, under authority of the 1841 act, or, with the limited classes of funds to which the 1880 act and the General Allotment Act applied, deposit them in the treasury at interest. Now he was given the additional alternative of depositing the funds in banks.[48/]

To keep Indian trust funds in non-interest-bearing treasury accounts was not one of the alternatives the 1918 act gave the Secretary.

48/ At oral argument, the defendant's counsel mistakenly contended that the 1918 act requires segregation of tribal funds before they can be deposited in banks or invested in bonds. The statute shows on its face that segregation, deposit in banks, and purchase of U. S. bonds are alternatives. None is a prerequisite to another. Also see S. Rept. 272, 65th Cong., 2d Sess. 25 (1918) (B-47). A later Secretary of the Interior, urging passage of legislation to authorize the payment of interest on idle Indian funds in the treasury, stated only that it "had proved impractical" to deposit the funds at interest or buy bonds with them, not that he was prevented from doing so because the individual Indians' shares were not yet segregated. See letter of Roy O. West to Senator Lynn J. Frazier, Chairman, Committee on Indian Affairs, January 3, 1929, in S. Rept. 1396, 70th Cong., 2d Sess. (1929) (B-61), quoted in part below in this opinion.

First, discretion vested in the Secretary of the Interior, great as it may be, is confined to the limits of reason. Tooahnippah v. Hickel, 397 U. S. 598 (1970); Arenas v. United States, 322 U. S. 419 (1944); United States v. Laughlin, 249 U. S. 440 (1919). Leaving trust funds idle when they could readily be invested is so harmful to the beneficiary and incompatible with the basic concept of trust responsibility as to lie beyond the bounds of legal discretion. As the Supreme Court stated in the Intermountain Rate Cases, 234 U. S. 476, 491 (1914):

> . . . an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion not be transcended. . .

Second, the 1918 act did not repeal the 1841 act. The mandate of the earlier statute to make all funds held in trust by the United States productive was not superseded. The whole thrust of the 1918 legislation was to increase productivity, not to legalize idleness.

Senator Charles Curtis was the author of section 28 of the Act of May 25, 1918. He explained the purpose of the investment provisions as follows during the debate on March 23, 1918 (56 Cong. Rec. 3966) (B-48):

> . . . There is $11,000,000 of Indian funds in the Treasury of the United States to-day not drawing a cent of interest. This item was prepared by me, and agreed to by the committee, so that the Indian Office could place this money in banks or, if the Commissioner of Indian Affairs saw fit and thought it was for the best interest, he might buy liberty bonds with the $11,000,000. In addition to the $11,000,000 belonging to tribes that draws no interest there is some thirty-odd million dollars of individual funds drawing less interest than 4 per cent, and the item was put in allowing the commissioner, if he thought best, to invest either of these funds in liberty bonds.

Senator Curtis was even more explicit in committee, when he first proposed the amendment (Hearings on H. R. 8696 Before the Senate Committee on Indian Affairs, 65th Cong., 2d Sess. 176 (1918--B-46)):

> . . . A showing was made before this committee at the last session of Congress that there were $11,000,000 in the Treasury of the United States belonging to the tribes, upon which not one cent of interest was paid. A showing was made that one tribe had to its credit $600,000, and that no interest was being drawn, while members of that tribe were in a starving condition. This amendment that I offer is to correct that situation . . .
>
> * * * * * *
>
> Surely this committee will not let another year go by where we will have these Indians with $11,000,000 on deposit without drawing a cent of interest. Surely this committee will not let another year go by while Indians suffer at the same time that they have money in the Treasury of the United States that is not drawing interest.

To legalize the existing practice of holding certain Indian trust funds idle was clearly the last thing Congress intended by the 1918 act.

Senator Curtis's figure of $11,000,000 in idle trust funds comes from the testimony of Assistant Commissioner of Indian Affairs Edgar B. Meritt on February 16, 1917, at page 46 of Hearings on S. 8272 Before the Senate Committee on Indian Affairs, 64th Cong., 2d Sess. (1917--B-43). Mr. Meritt's testimony necessarily was based on treasury balances, either the closing balances for fiscal year 1916, which were the latest published, or more recent unpublished figures. Opening and closing balances in the Indian trust fund principal accounts for fiscal year 1917 were as follows. See Combined Statement of the Receipts and Disbursements, Balances, etc. of the United States During the Fiscal Year Ended June 30, 1917 at 140-142 (the 1917 opening balances are the same as the 1916 closing balances):

July 1, 1916		June 30, 1917
$ 7,704,883.32	Indian Moneys, Proceeds of Labor	$ 7,651,660.73
3,819,636.75	Other non-interest-bearing accounts	3,645,226.00
$11,524,520.07	Subtotal, non-interest-bearing accounts	$11,296,886.73
33,211,790.38	Interest bearing accounts	29,961,356.05
$44,736,310.45	Grand total, trust fund principal accounts	$41,258,242.78

There can be no doubt, therefore, that the IMPL was one of the "trust funds" which the 1918 act authorized to be withdrawn from the treasury and deposited in banks or invested in Government bonds. Without including it in the total, the non-interest-bearing trust funds come nowhere near the total which was reported to the Senate by the legislation's sponsor.

The Comptroller General ruled that interest on tribal money deposited in a bank under authority of the 1918 act should become a part of the principal amount on deposit, i.e., should be compounded, rather than put back in the IMPL fund. *See* letter to Secretary of the Interior, February 11, 1926, quoted in H. Rept. 897, 69th Cong., 1st Sess. (B-57.)

We have discovered no good reason for the continuing failure of the Interior Department and Bureau of Indian Affairs to invest the IMPL fund after the reminder given them by the 1918 act. Secretary West's statement (*supra*, note 48) that investment was impractical "because of the small amount of money in many of the accounts; [and] the fact that in a great many instances the funds are needed for current expenses" is unconvincing. The IMPL was a common trust fund from its inception. Ease and speed of investment, the opportunity to invest small balances, and the economy and speed of sale when one participating trust desires to sell and another wishes to increase its holding in the fund are among the special advantages of common trust funds. G. Bogert, *Trusts and Trustees*, § 677 (2d ed., 1960).

The Act of September 11, 1841 (31 U. S. C. § 547a) is not mentioned in any of the legislative history of the 1918 act brought to our attention. It was probably unknown to the Indian Office and the Congress in 1918, since this was during its period as a "lost law".

The 1883 act and the 1887 act were amended by the Act of May 17, 1926, c. 309, 44 Stat. 560.[49/] The amendatory act was requested by the

49/ The following is the text of the act:

> CHAP. 309--An Act To authorize the deposit and expenditure of various revenues of the Indian Service as Indian moneys, proceeds of labor.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter all miscellaneous revenues derived from Indian reservations, agencies, and schools, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor," and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by section 27 of the Act of May 18, 1916 (Thirty-ninth Statutes at Large, page 159).
>
> SEC. 2. The Act of March 3, 1883 (Twenty-second Statutes at Large, page 590), and the Act of March 2, 1887 (Twenty-fourth Statutes at Large, page 463), are hereby amended in accordance with the foregoing.

The intent of the 1926 act was probably only to modify the 1883 and 1887 acts and not to supersede them with the quoted language. Evidence of this limited intent is furnished by the Act of May 29, 1928, c. 901, § 1 (68), 45 Stat. 991, which expressly repealed the 1887 act's requirement for annual reports on expenditures from the IMPL fund, although the requirement had not been carried forward into the 1926 act.

The editors of the United States Code consider that the 1883 exemption relating to the Five Civilized Tribes is still in force. The following composite version of the 1883, 1887, and 1926 acts appears in Title 25 of the Code (1970 ed.):

> §155. Disposal of miscellaneous revenues from Indian reservations, etc.
>
> All miscellaneous revenues derived from Indian reservations, agencies, and schools, except those of the Five Civilized Tribes and not the result of the labor of any member of such tribe, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor", and are made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by sections 123 and 142 of this title. (Mar. 3, 1883, ch. 141, § 1, 22 Stat. 590; Mar. 2, 1887, ch. 320, 24 Stat. 463; May 17, 1926, ch. 309, § 1, 44 Stat. 560; May 29, 1928, ch. 901, § 1, 45 Stat. 991.)

Secretary of the Interior for the following reason, stated in his letter of April 6, 1926, to the Chairman of the House Committee on Indian Affairs (see H. Rept. 897, 69th Cong., 1st Sess. (1926) (B-57)):

> The Comptroller General of the United States has recently held that the only revenues which legally may be covered into the Treasury and expended as Indian moneys, proceeds of labor, are those specifically mentioned in the act of 1883, viz, "proceeds of all pasturage and sales of timber, coal, or other products of any Indian reservation," but that the long established practice of depositing and using moneys derived from the other sources mentioned will not be disturbed until July 1, 1926, in order than an opportunity may be afforded for procuring remedial legislation, it having been represented to him that obligations had been incurred against the anticipated revenues for the current fiscal year and that to forbid the use thereof at this time would seriously handicap the business of the Indian Office.
>
> Such revenues have been relied upon for a good many years to meet a very material part of the necessary expenses connected with the support, civilization, and education of Indians. These moneys do not belong to the United States, and if there is no authority to expend them after July 1, 1926, larger appropriations by Congress will be absolutely essential unless the efforts of the department in behalf of the Indians are to be materially curtailed.

Presenting the remedial bill to the Senate on May 10, 1926, the Chairman of the Indian Affairs Committee, John William Harreld of Oklahoma, stated (67 Cong. Rec. 9077);

> . . . This bill is simply to authorize them [Department of the Interior] to do just what they have been doing--to place those miscellaneous collections to the credit of any particular tribe under the head of "Indian moneys, proceeds of labor," and then to spend the money for the benefit of that particular tribe. It is what they have been doing since 1883, as I say; but because of objections made by the Comptroller General they need this legislation to settle the difficulty.

The amendatory act of 1926 had nothing to do with investment, and did not affect the applicability of either the 1841 act or the 1918 act to the IMPL fund.

The Senate debate on the 1926 act illustrates the ignorance of Congress during that period of the IMPL fund, the law governing it, its actual administration, and its size, as witness the following colloquy (ibid.):

> Mr. LENROOT. Mr. President, I should like to ask the Senator what becomes of these miscellaneous revenues now. Where do they go?
>
> Mr. HARRELD. It seems that they carry an account of this sort with each tribe separately, and these miscellaneous collections are credited to that account; and they have for years been paying that out for the benefit of the tribe in a way authorized by Congress, I presume, or perhaps it was a small amount and was paid out on their own initiative. I am not sure about that.
>
> Mr. LENROOT. Is there not any law that now requires the disposition of those revenues?
>
> Mr. HARRELD. They have never thought there was any need for a law. These are only small amounts, just the odds and ends of collections on behalf of the tribe.
>
> Mr. LENROOT. I supposed that we had some law that required some disposition of all revenues received from every source; and if there is such a law, this bill in its present form would not accomplish it.
>
> Mr. HARRELD. I do not know about the form of it. I introduced the bill just in the form in which they asked me to introduce it.

Ignorance of the 1841 act is further evidenced by the request for legislation made by the Secretary of the Interior on January 3, 1929, supra, note 48). In this letter the Secretary wrote:

> . . . As shown by the accompanying statement the Government is holding a large amount of money belonging to various tribes of Indians throughout the United States, no part of which is drawing any interest and it is felt by this department that the Government, as guardian of

> the Indians, is not doing full justice to its wards by holding and using this money without compensation to them. It is conceded that there is no legal obligation to pay interest on these funds, but the fact that the Government has obligated itself to pay interest on other funds of similar origin would appear to constitute a moral obligation which is now only partially fulfilled.

This was written during the period when the 1841 act was omitted completely from the United States Code. The implication under § 2(5) of the Indian Claims Commission Act (25 U.S.C. 70a (5)) of the Secretary's acknowledgment of a moral obligation deserves emphasis.

The result of the Secretary's letter was the act of February 12, 1929, c. 482, 45 Stat. 1164, 25 U.S.C. § 161a, which read as follows:

> . . . all money in excess of $500 held by the United States in a trust fund account, and carried on the books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum from the date of the passage of this Act . . .

Although it clearly appears to us that the Secretary and the Congress intended the 1929 act to apply to the IMPL fund,[50] the Comptroller General on May 31, 1929, ruled that it did not, because the IMPL was not "carried on the books of the Treasury Department to the credit of an Indian tribe." Decision A-27308, 8 Comp. Gen. 625 (1929--B-64). It was, as stated above, carried as a single common trust fund at the Treasury, and identified as to tribes only on the books of the Indian Office.

50/ H. R. Rept. 1272, 71st Cong., 2d Sess., to accompany H. R. 11782, which became the 1930 act discussed below, states, "The law as it now stands [i.e., the 1929 act] was originated primarily with the idea of authorizing the payment of interest on these funds." *See* B-65.

Congress passed corrective legislation the next year. See Act of June 12, 1930, c. 483, 46 Stat. 584, 25 U. S. C. §§ 161b-161d.

Prior to the 1930 legislation, the 1929 act of its own force started the payment of interest on a number of funds in the treasury upon which interest was not previously being paid. These funds consisted largely of proceeds of judgments of the Court of Claims and proceeds of lands sold under certain post-1880 statutes which contained no explicit provision for payment of interest.

By the Act of June 24, 1938, c. 648, 52 Stat. 1037, 25 U. S. C. § 162a, the investment provisions of the 1918 act were superseded by more flexible authority for deposit of tribal funds in banks or investment in public-debt obligations of the United States or other securities unconditionally guaranteed as to both principal and interest by the United States.

VII. THE INTEREST RATE

Logically, the plaintiffs should be awarded the amount they would have received if their trust moneys, and the interest accruing thereon, had been invested according to law during the period the defendant held them idle. It would be a hopeless undertaking, however, to attempt reconstruction of the investment programs of the many individuals who served as Secretary of the Interior during that period, especially after 1918, when they had discretion to choose between different kinds of investments. In such circumstances courts usually fix the recovery by awarding interest which approximates the expected yields. G. Bogert, Trusts and Trustees, § 702 at 409.[51/]

In Peoria Tribe v. United States,[52/] on remand from the Supreme Court,[53/] the parties agreed that interest should be the measure of damages for the Government's failure to invest a trust fund.

Five percent was used in Peoria. This figure agrees with the minimum rate prescribed in the act of 1841 (31 U. S. C. § 547a) and with the rate we established for Indian just compensation cases in Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264 (1972). Five percent was a traditional figure in the Government's financial dealings with the Indians during the

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51/ In this connection we think it irrelevant to what extent the Government may have used the Indians' money which it held in its treasury without payment of interest. The mandate of the Indian Claims Commission is to compensate the Indians, not to punish the Government. Cf. G. Bogert, Trusts and Trustees, § 701 at 406.

52/ Docket 65, 20 Ind. Cl. Comm. 62 (1968).

53/ 390 U. S. 468 (1968).

period ending in 1934. Id. at 301; Alcea Band of Tillamooks v. United States, 115 Ct. Cl. 463, 518, 87 F. Supp. 938 (1950), rev'd on other grounds, 341 U. S. 41 (1951); see also Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 11-12, 152 F. Supp. 953 (1957); Rogue River Tribe v. United States, 116 Ct. Cl. 454, 89 F. Supp. 798 (1950), cert. denied, 341 U. S. 902 (1951).

In Fort Berthold we rejected a suggestion that we adopt the legal interest rate of the state where the property was located, writing as follows (28 Ind. Cl. Comm. at 279):

> . . . We deem it more proper that a single, national, uniform standard for Indian claims be adopted, reflective of the unique and exclusive relationship of the Federal Government and the Indian claimants.

We also rejected the suggestion that varying rates be used for different periods in accordance with the historical fluctuations of the money market. In this connection we stated (at page 300):

> The Commission does not find merit in the idea that the just compensation rate should be subject to such recalculation every 20 years, although we recognize that the greatest accuracy would be achieved by calculating a new rate for every year. For this type of judicial determination, however, there is an advantage of stability and convenience over extreme accuracy. Over the whole period 1943-1971 inclusive, calculations as above show the comparative just compensation rate to be 5.4 percent. It appears that in the long term 5 percent is a rate that conveniently averages the ups and downs of economic activity.

A uniform interest rate, applicable across the board except where otherwise required by positive law, is particularly desirable in accounting cases.

If the Commission should adopt several rates applicable to different funds or periods, the plaintiffs would in effect be challenged to try and fit their claims into the highest category and the defendant to keep them in the lowest. The matter of interest rates would thus be litigable in every case, and much of the advantage of choosing interest over actual lost income as the measure of damages would be destroyed.

Our accounting cases have already been long delayed. In times of inflation, all delay is unjust to the plaintiff whose claim is valid, since we have no jurisdiction to compensate for the fall in value of the dollar. Nooksack Tribe v. United States, 162 Ct. Cl. 712 (1963), cert. denied, 375 U. S. 993 (1964). Interest, awarded in trust cases as a substitute for the income the plaintiff should have received long ago, is not intended to, and does not, compensate for the effects of inflation. Thus, when we have legal discretion to choose between alternative rules for calculating damages, we are impelled toward that one which can be applied with the least delay.

We believe the 5 percent rate applied to the failure to invest in Peoria should be used here too.

An additional weighty factor which impels us to use the uniform 5 percent rate in trust cases is that these are claims in equity. Restatement (Second) of Trusts §§ 197, 198 (1959). When we adjudicate such claims we sit as a court of conscience. Indian Claims Commission Act § 2 (1), 26 U. S. C. § 70a (1); Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U. S. 806 (1945); Deweese v. Reinhard, 165 U. S. 386 (1897); Wilson v. Wall, 73 U. S.

(6 Wall.) 83, 90 (1867). In Fort Berthold, supra, we decided that 5 percent interest is required for just compensation. It would shock our conscience, absent a statute or treaty so requiring, to award damages for breach of a fiduciary duty at a rate which provides less than just compensation. The circumstances here urge equity to follow the law and apply the same 5 percent rate.

In summary, we believe Congressional policy expressed in the 1841 act, tradition, practicality of application, the need to avoid unnecessary delay, and good conscience require us to adhere to a uniform 5 percent interest rate to measure damages for failure to make trust funds productive in all cases where a different rate is not prescribed by positive law.

VIII. THE MEASURE OF DAMAGES FOR FAILURE TO INVEST THE IMPL FUND

Measuring the damages for failure to invest an actual fund that had frequent deposits and withdrawals is no simple matter. The case of the IMPL fund is further complicated by the requirement of the 1841 act for investment of "the annual interest accruing thereon". Determining the appropriate interest rate, as we have done above, is only the first step.

The instant case thus differs markedly from the Peoria situation (supra, notes 52 and 53), which involved only the Government's failure to place a definite sum in an account bearing simple interest.

During the entire period from 1883 to 1930, when the IMPL fund did not bear interest, the United States managed it as a common trust fund. The 1841 act applied to "funds held in trust by the United States" and not to undivided shares in such funds. The IMPL fund, therefore, should have been invested as an entity, without regard to the various tribes' respective shares.

Periodically the aggregate of accessions to the fund, consisting of the revenues coming in from the reservations to Washington and any annual interest payments that might have been received from prior investments, ought to have been used to buy Government bonds, to the extent that these accessions exceeded disbursements. We believe this should have been done not less often than once a month. Cf. Menominee Tribe v. United States, 107 Ct. Cl. 23 (1946). In months when disbursements exceeded accessions, the officers administering the trust would, of course, have sold rather than bought bonds.

To accord with our determination of the appropriate interest rate, it must be assumed that all bonds were purchased at par and yielded 5 percent interest per year. To accord with the 1841 act's requirement for reinvestment of "annual interest", it must be further assumed that the bonds paid interest only once a year.

Administered, as it ought to have been, under such a program, the IMPL fund would have grown, but, except during the period between 1883 and 1887, not in the uncomplicated geometric progression of money left on deposit in a savings account at compound interest. During the 1883 to 1887 period no withdrawals were authorized, and all accruing interest should have been reinvested.

The plaintiffs' damages are measured by the loss of growth of their respective shares in the funds, due to the fact that the fund was not actually invested.

On July 1, 1930, the date the common trust fund was broken up into separate tribal accounts, pursuant to the Act of June 13, 1930, 25 U. S. C. § 161b, each tribe's share would have been of greater value than it actually was if the fund had previously been invested according to law. The difference between the actual value of such share and the value to which it would have grown if invested represents an element of damage which became fixed on July 1, 1930. But it also represents a shortage in the amount that ought to have been placed in each tribe's separate 4 percent account created on that date. Due to such shortage each plaintiff has lost interest ever since 1930. The plaintiffs are entitled to additional damages equal to the lost interest, that is, in the amount of 4 percent per annum from July 1, 1930, until the date of payment, on the shortages in their respective separate accounts.54/

54/ The separate accounts are termed by the Interior and Treasury Departments "Proceeds of Labor" (followed by the name of the tribe), the words "Indian Moneys" no longer being used. The separate accounts of the plaintiffs herein, for example, are entitled, respectively, "Proceeds of Labor, Western Shoshone Indians, Nevada", and "Proceeds of Labor, Mescalero Indians, New Mexico".

Interest is not credited back to the account on which earned, as it would be in a savings bank, but is deposited to an additional, non-interest-bearing account named "Interest on Proceeds of Labor" (followed by the name of the tribe).

The question of whether the defendant was under a duty to make the money in the interest accounts productive is not before the Commission in these cases. While the plaintiffs' brief, which is applicable to several other cases as well as the instant ones (see note 1), argues that the defendant was under a duty to invest the money in the interest accounts, neither of the present plaintiffs raised the issue by appropriate exception.

We hold that the damages in these cases are to be determined by calculating what each tribe would have had on deposit on June 30, 1930, if, on the occasions its moneys were put into and taken out of the IMPL fund, they had instead been deposited or withdrawn from a passbook savings account paying 5 percent interest once a year. As customary with such accounts, the interest payments should be treated simply as deposits. Disallowed expenditures should be treated as if they had never been withdrawn.

The difference between the amount so computed and the amount actually placed in the tribe's separate "Proceeds of Labor" account on July 1, 1930, is that tribe's basic damages. It consists of the aggregate of the lost interest and the disallowed expenditures.

On the basic damages so computed, the plaintiffs are entitled, pursuant to the 1930 act, to simple interest from July 1, 1930, until payment of the final judgment of this Commission, at the rate of 4 percent per annum. Part of this interest--that due on the principal sums of the disallowed expenditures--has already been awarded in Docket 326-A by our 1970 decision. Damages computed as we have just stated will include this previously awarded interest and will not be in addition to it.

In awarding damages equal to compound interest upon the entire IMPL fund for the period between 1883 and 1887 and upon sums unlawfully expended from the fund for the period ending June 30, 1930, we have not overlooked the numerous cases refusing compound interest against the United States. 55/ In all of these cases which we have read, except one, the courts seem totally unaware of the 1841 act. What these cases hold is that compound interest, indeed any interest, cannot be assessed against the Government in the absence of statutory or constitutional authority. We have such authority here, in the 1841 act and in the Indian Claims Commission Act.

To be more precise, we have the authority, and duty, to award damages for breach of the 1841 act, which damages are measured by interest. The Supreme Court pointed out the subtle distinction between interest as such and damages measured by interest in its most recent case denying compound interest. Peoria Tribe v. United States, 390 U. S. 468 (1968).

In Peoria, this Commission had awarded $172,726 in damages against the United States for selling plaintiff's lands at private sale rather than at public auction as required by treaty. We denied the plaintiff's

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55/ For example: Peoria Tribe v. United States, 390 U.S. 468 (1968); United States v. Isthmian Steamship Co., 359 U.S. 314 (1959); Cherokee Nation v. United States, 270 U.S. 476 (1926); Menominee Tribe v. United States, 97 Ct. Cl. 158 (1942); Choctaw Nation v. United States, 91 Ct. Cl. 320 (1940); cert. denied, 312 U.S. 695 (1941); Ute Indians v. United States, 45 Ct. Cl. 440 (1910).

claim for interest on the $172,726, although the treaty provided for investment of the proceeds of the land sales. See Docket 65, 15 Ind. Cl. Comm. 123, 156 (1965).

The Court of Claims affirmed in a 3-2 decision, 177 Ct. Cl. 762, 369 F. 2d 1001 (1966). On certiorari, the Supreme Court reversed, stating (390 U.S. at 470-471):

> . . . this is not a case where the Court is asked to exercise "the power to award interest against the United States" . . . The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

The Government's obligations, the court held, included that of investing the $172,726, and it was liable in damages for not doing so.

The court did not require that such damages take the form of interest, but left how to measure them up to this Commission on remand. In footnote 6 on page 473, the court stated as follows:

> The respondent did not brief or argue the question of how to measure these damages . . .
>
> Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest.

The 1841 act does not appear to have been brought to the court's attention. Necessarily the court did not decide whether that act applied to the Peoria fund. The governing treaty provided that the interest on the fund was to be annually paid over to the Indians or expended for their benefit. This provision is inconsistent with the 1841 act's direction that accruing interest be reinvested. Peoria is therefore distinguishable from the instant case, falling within the exception "when not otherwise required by treaty".

The instant case cannot fall within that exception, for the statutes governing the IMPL fund contain nothing inconsistent with reinvestment of income. Thus the measure of damages must include not only compensation for the failure to produce simple interest, but also for the failure to reinvest so much of it as was not lawfully expended. We are not here awarding interest on a judgment for simple interest, but including an additional factor in our judgment to make up for the income which should have been, but was not, earned on reinvested interest.

The only practical way we can think of to assess damages for failure to comply with the law requiring investment and reinvestment of the income is by awarding compound interest. The Peoria decision of the Supreme Court is no authority to the contrary.

The only case denying compound interest against the Government which we have discovered where the 1841 act was cited is Cherokee Nation v. United States, 270 U.S. 476 (1926). The court held the act inapplicable, because the Government and the Cherokees had entered into subsequent agreements for simple interest.

The defendant advanced another argument against compound interest in Cherokee--that it would result in an excessive recovery. The plaintiff asked compound interest for 88 years upon $1,111,284.70. The Supreme Court said (270 U.S. at 492):

> . . . This claim proves too much. It would require compound interest brought about by annual or semiannual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt.

The Solicitor General misled the court. The national debt in 1926 was $19,643,216,000.[56/] Five percent interest on $1,111,284.70 compounded annually for 88 years would amount to $80,262,338, or about four-tenths of one percent of the 1926 national debt.

In any event, the proposition that a court should depart from the law because following it may result in the plaintiff's getting too much is an unworthy one, and was not the ground of decision in Cherokee Nation, supra. As Judge Davis wrote in dissent in Peoria Tribe v. United States, 177 Ct. Cl. 762, 775, 369 F. 2d 1001 (1966):

> It is irrelevant that an award of interest, pursuant to the 1854 treaty, could increase the award to plaintiff by five or six times. If the treaty so provides, we cannot refuse interest because the amount is relatively large.

If damages awarded under the Indian Claims Commission Act should approach the size of the national debt--which they never will--it would mean that the wrongs done to the Indians by the United States were

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56/ U. S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, at 720 (1960).

correspondingly enormous. It would not constitute a wrong by the Indians against the Government.

We have found only four cases besides Cherokee where the reports mention the 1841 act.

The earliest is United States, ex rel. Angarica v. Bayard, 127 U.S. 251 (1888). Mr. Angarica was an American citizen whose claim for damages in the Cuban insurrection had been approved by the Spanish-American Claims Commission set up by executive agreement in 1871. Under this agreement, claims might be presented only through the United States Government, and awards were paid by the Spanish Government to the American Secretary of State for distribution to the successful claimants. Spain paid the amount of Angarica's award to the Secretary.

When he paid Angarica, the Secretary withheld 5 percent of the award as security for Spain's payment of the expenses of arbitration. Pursuant to the 1841 act, the Secretary invested the amount withheld in United States bonds, and reinvested the interest as it was received.

After a delay of several years, Spain paid the expenses of arbitration. Thereupon the Secretary paid Angarica the exact amount that had been originally withheld from his award, not paying over any of the accumulated interest.

Angarica's executrix sued for mandamus to compel payment of the interest.

The Secretary of State justified his refusal to pay over the interest as follows: Since the 1841 act "was silent as to the beneficiary by such a transaction, 'the sole competence of Congress, which prescribed the mode of investment, to direct the disposition of the proceeds, is beyond dispute'." 127 U.S. at 256.

The trial court refused the mandamus. United States, ex rel. Angarica v. Bayard, 15 Mackey 310 (D. C. Sup. Ct. 1885) (D-117). It stated:

> . . . the [1841 act] relates only to a class of trusts which cannot be interfered with or disposed of by executive power without further legislation, and this construction is supported by contemporaneous facts and other statutes. At the time of the enactment of 1841 there existed certain treaties with the Indians, containing stipulations for the payment to them annually of interest upon the proceeds of land ceded by them, and it had already been provided, by the act of January 9, 1837 (5 Stat. 135), which is now embodied in the Revised Statutes as section 2096 [25 U.S.C. § 158], that these funds should be invested in securities at not less than five per cent interest. It was clearly for trusts of this definite character, established, as we have said, by law, that the act of 1841 proposed to establish a general system. This is especially indicated by the exception in that act of cases regulated by treaty. The reference is to these Indian treaty funds. We think, then, that the statute did no apply to the transaction in question, and it is evident that the executive did not propose to conform to its requirements.

The Supreme Court of the United States affirmed, as it stated, "in general terms". It did not rule on whether the 5 percent withheld from Angarica's award was a trust fund, or whether the 1841 act properly applied to it. Rather it held that there was no difference between a claim for interest actually received by the United States and a claim against the United States for interest. Both, it stated, were barred by "the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect". 127 U.S. 260.

A later Supreme Court criticized the Angarica reasoning thus, in Henkels v. Sutherland, 271 U.S. 298, 302 (1926):

> . . . Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment.

The 1841 act was mentioned in passing in United States v. Blackfeather, 155 U.S. 180 (1894). Here the Court of Claims had allowed the Shawnee Indian Tribe interest upon a sum found due to it because the United States sold ceded tribal lands at private sale rather than public auction as required by treaty. See 128 Ct. Cl. 447 (1893). The treaty provided that the net sale proceeds should constitute a fund upon which the United States would pay 5 percent annually "as an annuity". In affirming, the Supreme Court stated (155 U.S. at 192):

> It is true it is called an annuity, but the amount of the annuity is measured by the interest paid upon funds held in trust by the United States, (Rev. Stat. § 3659 [the 1841 act],) upon investments for Indians, (§ 2096 [the 1837 act],) as well as by the interest paid upon the affirmance by this court of judgments of the Court of Claims. (§ 1090.)

The 1841 act's requirement for investment of accruing interest was not mentioned. As in Peoria, supra, the treaty provision for annual payment is incompatible with reinvestment.

The only other judicial citations of the 1841 act we have found are in two Court of Claims cases.

The earlier was Ottawa and Chippewa Indians v. United States, 42 Ct. Cl. 240 (1907). It involved a trust fund in the original principal sum of $20,000, which had been invested in bonds pursuant to the treaty of March 28, 1836, 7 Stat. 491. Proceeds of the investments were covered into the treasury as public moneys in 1885, under a disputed interpretation of a release clause in the treaty of July 31, 1855, 11 Stat. 624. The court stated (42 Ct. Cl. at 245):

> In 1885 these securities, from accrued interest and reinvestment, had accumulated to the amount of $62,496.40, but some time in that year they were covered into the Treasury of the United States.
>
> This action is brought by the claimants to recover the above amount and interest, under section 3659, Revised Statutes [the 1841 act], pursuant to an act of Congress approved March 3, 1905, conferring jurisdiction upon this court for that purpose.

The court held that the $20,000 placed in trust under the 1836 treaty prior to 1855 was fully vested in the Indians so as not to be affected by the clause in the 1855 treaty releasing the defendant from all liability under former treaties.

The Court of Claims gave the Indians judgment for the entire $62,496.40 to which the Ottawa and Chippewa fund had grown by 1885, plus interest at the rate of 5 percent per annum from that year. The Court did not discuss why it allowed interest upon the interest accumulated up to 1885, but, apparently, only simple interest thereafter.

The only remaining judicial citation of the 1841 act we have found is in the recent case of Bonnar v. United States, 194 Ct. Cl. 103, 438 F. 2d 540 (1971). As in the Henkels case, quoted above, property of the plaintiff, an American citizen, had been mistakenly seized by the Alien Property Custodian. The court held the Government liable for the proceeds of its sale, but denied the plaintiff's claim for interest. The court distinguished Henkels on the ground that in the present case the proceeds had been deposited in the Federal treasury and no interest had accrued upon them while in Henkels they had been invested in Government bonds.

The plaintiff pointed out that a 1962 amendment to the Trading With the Enemy Act, 50 U.S.C. App. § 9(a) (1964), expressly provided that the proceeds of sale would be held "in trust" by the Secretary of the Treasury. He expressly cited the 1841 act as requiring investment of all funds held in trust by the United States. The Court of Claims disposed of the contention thus (194 Ct. Cl. at 163, 438 F. 2d at 572-573):

> To this argument, we have two responses. First, §9(a) of the Act could have specifically referred to 31 U.S.C. § 547

> (a), or required the Treasurer to invest the proceeds of any sale or liquidation. However, that section makes no such reference, and we regard this as a strong indication that Congress intended to limit recovery to the allocated sales proceeds. Second, and most importantly, this question was carefully considered in Gmo. Niehaus & Co. v. United States 179 Ct. Cl. 232, 373 F. 2d 944 (1967), which was decided after the Act was amended in 1962, and it was answered adversely to plaintiffs' contentions.

Niehaus did not consider the 1841 act, but it did find a Congressional policy against awarding claimants of property erroneously seized and sold under the Trading With the Enemy Act any more than the net proceeds of the sale.

We believe this Congressional policy is the true basis of decision in Bonnar.

We do not believe that Bonnar is controlling here. While an amendment to the Trading With the Enemy Act passed in 1962 may well not incorporate without specific reference a long-forgotten law enacted 121 years before, the same is not true of the amendment to the deficiency appropriation bill of 1883 which created the IMPL fund. In 1883, Congress was only 42 years away from 1841, and had cited and quoted the 1841 act only three years before, in the committee report on the bill which became the 1880 act. S. Rept. 186, 46th Cong., 2d Sess. (1880-B-36).

A stronger reason for not following Bonnar, however, is that the Indian Claims Commission Act embodies a far more liberal Congressional policy toward claimants than the Trading With the Enemy Act. Speaking of the Indian Claims Commission Act, the Court of Claims stated in Oneida Tribe of Indians v. United States, 165 Ct. Cl. 487, 492, cert. denied, 379 U.S. 946 (1964):

> Without that legislation, a justiciable claim might not be stated. . . But the Act has authorized recoveries on the basis of original Indian title . . . and there is no reason why a claim of the sort presented here could not come under the "fair and honorable dealings" provision (section 2(5))--at the minimum. If the Federal Government failed to treat fairly and honorably, in the circumstances, with the reservation timber, the defendant would be liable under the Act even though no conventional claim in law or equity was presented.

What the Court of Claims said above about the reservation timber applies as strongly to the miscellaneous reservation revenues which made up the IMPL fund. While our decision is based upon violation of a statute, the 1841 act, we believe it would have been unfair and dishonorable for the Government even in the absence of the statute unilaterally to seize the Indians' money, as it did, and deprive them of its use for extensive periods without making compensation.

It ought always to be remembered that the IMPL fund was made up of existing Indian moneys. The plaintiffs here are not making claim for moneys the defendant ought to have paid to them out of its treasury. They are claiming damages for their own moneys which the defendant admittedly took from them.

When the Government possessed itself of the tribal revenues and put them into a fund in Washington, it took away from the Indians something they already had. The Government's only moral justification for such action would be that it could manage the money better than the Indians. When, in fact, it did not manage the money at all, but only made it unavailable to the Indians, it did them a wrong as surely as if it had excluded them from their land. When it misspent a part of the

IMPL fund, it wasted a part of the Indians' estate as surely as if it had destroyed part of their land.

Congress gave us no mandate to act as watchdog of the Treasury and seek pretexts for denying Indian claims on the basis of their size rather than their merits.

Thus, when in Peoria Tribe v. United States, Docket 65, 15 Ind. Cl. Comm. 123, 156 (1965), we invoked the familiar rule that interest against the United States cannot be awarded without express statutory authority, the Supreme Court reversed, stating (390 U.S. 468 at 472):

> "Indian treaties ' are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.' . . .'[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

Statutes as well as treaties are to be read in a spirit of generosity toward the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Nice, 241 U.S. 591 (1916); United States v. Celestine, 215 U.S. 442 (1909). This is especially true of the interpretation of a sweepingly remedial statute such as the Indian Claims Commission Act. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 562, 390 F. 2d 686 (1968), aff'g in part, rev'g in part, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965); Otoe and Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265, cert. denied, 350 U.S. 848 (1955) (aff'g Docket 11, 2 Ind. Cl. Comm. 355 (1953)).

We therefore believe that we must read the 1841 act literally, follow the usual rule that it has prospective operation, and award damages for breach of its mandate to invest interest accruing on funds held in trust by the United States, where appropriate, as well as for breach of its mandate to invest the principal.

We are not confronted in these two cases with the question of whether the 1841 act's requirement for investment of accruing interest attaches to interest paid under the 1929 or 1930 act. We will address ourselves to this question whenever it is properly before us. See note 54, above.

The members of this Commission are not accountants and will not presume to specify the techniques which must be used to compute the damages as above described, unless the parties are unable to agree. In that event we will take expert testimony in an open hearing before issuing any decision.

We believe that the lawyers and accountants for the parties, conferring together in a spirit of professional good will, can best solve the technical problems occasioned by today's decisions.

We do not intend to rule out simplified accounting methods, so long as they produce results accurate enough for substantial justice. Indeed, we would prefer accounting to be finished promptly rather than to be unnecessarily refined.

Since the General Services Administration tribal accounting section is just now being restaffed, this is a particularly opportune time to determine what additional financial information may be essential, or helpful, to solve the problems of calculating interest and other technical accounting problems.

The parties and their accountants will be ordered to confer within 30 days from the date of this opinion to discuss the question of what information should be supplied, and in what form. They will be further ordered to file with the Commission, within 45 days of the date of this opinion, a joint statement summarizing their discussions and stating what was agreed upon and what, if anything, remains in disagreement. The parties may accompany their joint statement with appropriate motions to obtain our rulings on the matters in disagreement or any other orders which they contend would assist in moving these cases on to final adjudication at an early date.

The periods for conferring and submitting a joint statement will not be extended on account of any motion for rehearing that may be filed herein.

IX. INTEREST ON SHORTAGES IN PAYMENTS UNDER TREATIES

In our 1970 opinion in Te-Moak, 23 Ind. Cl. Comm. at 70-74, we tentatively found a shortage of $16,392.76 in fulfillment of the defendant's obligation under the Treaty of October 1, 1863, 18 Stat. 689. The plaintiff claimed interest on parts of this sum. We deferred decision, requesting the parties to "elaborate on their contentions on this issue, particularly concerning the basis for classifying moneys appropriated to satisfy treaty obligations as trust funds".

The only word on this matter we can find in any party's brief is the bare assertion, at page 37 of the plaintiffs', that unexpended portions of annuities and installment payments constitute funds held in trust by the United States.

The cases indicate that shortages in payments required by treaty are ordinarily regarded as breaches of contractual obligation rather than as breaches of trust. It appears immaterial whether the shortage occurred because Congress failed to appropriate the money, because the money was diverted after appropriation, or because the money, although appropriated, was just not expended. United States v. Omaha Indians, 253 U. S. 275 (1920), aff'g in part, rev'g in part, 53 Ct. Cl. 549 (1918); Confederated Salish and Kootenai Tribes v. United States, 175 Ct. Cl. 451, cert. denied, 385 U. S. 921 (1966); Rogue River Tribe v. United States, 105 Ct. Cl. 495, 552-553, 64 F. Supp. 339, 344 (1946); Choctaw Nation v. United States, 91 Ct. Cl. 320, 402 (1940), cert. denied, 312 U. S. 695 (1941).

The Comptroller General of the United States had occasion to distinguish (1) Indian trust funds from (2) unexpended appropriations for Indian purposes, following adoption of the Act of February 12, 1929, c. 178, 45 Stat. 1164, as amended, 25 U. S. C. §161a. This statute provided for the payment of interest on "all money in excess of $500 held by the United States in a trust fund account. . .". Reviewing a long list of existing treasury accounts, the Comptroller General wrote in Decision A-27308 of September 30, 1929, at pages 5-7:

> Under the heading "Fulfilling Treaties with", supra, there are listed a number of items which, from the information and data available, do not appear to be trust fund accounts within the meaning of the said act of February 12, 1929 . . . the items under this heading are appropriations for particular objects contemplated by treaties with the respective tribes; and while they may be considered and carried on the books, as has been done heretofore, as

> no-year appropriations to carry out the purposes for which made, there appears to be no authority of law to consider them as trust fund accounts upon which interest should be allowed under the act here under consideration.
>
> . . . .
>
> Trust fund accounts, as distinguished from appropriations made for certain expenditures, are those made up of funds collected by the Government for or on behalf of the Indians and authorized by law to be placed in the Treasury to the credit of said Indians for whose benefit they were collected, or of appropriated funds which the law specifically provides shall be placed in the Treasury as a trust fund for the Indian tribe involved. When the appropriation merely provides for expenditures, or for the doing of certain things for the Indians, as in the case of ordinary appropriations, it is not a trust fund account upon which interest as provided by the act of February 12, 1929, should be allowed.

The plaintiffs have given us no reason to reexamine the law upon this point.

X. DEFENDANT'S PENDING MOTIONS IN DOCKET 326-A

On March 6, 1973, while the foregoing opinion was in preparation, the defendant filed a motion to require the plaintiff Te-Moak Bands to file a more definite statement of continuing wrongdoings requiring an accounting beyond June 30, 1951. The latter date is the one to which the defendant's previously filed accounting report extends.

In our opinion in this case of April 29, 1970, 23 Ind. Cl. Comm. 70, 72, we stated generally that the defendant would be required to furnish an up-to-date accounting of all wrongs that originated prior to August 13, 1946, and continued past that date. In subsequent cases, however, we have required the wrongdoing to be defined before we would order accounting brought down to date. See Papago Tribe v. United States

Docket 102, 26 Ind. Cl. Comm. 365 (1971); Kiowa, Comanche, and Apache Tribes v. United States, Docket 259-A, 24 Ind. Cl. Comm. 393, 397 (1971); Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171, 175 (1972). Accordingly, our order of April 29, 1970, is vacated insofar as it requires the defendant generally to furnish an up-to-date accounting. See Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho v. United States, Docket 326-C, order dated July 11, 1973.

We are ordering the parties in the instant case to confer, with their accountants, and report to the Commission what additional financial information may be essential or helpful to comply with today's rulings. We have ordered the parties to file a joint statement summarising their discussions and stating what was agreed upon and what, if anything, remains in disagreement. They may accompany their joint statement with appropriate motions to obtain further rulings on the matters in disagreement or any other orders which they contend would assist in moving these cases on to final adjudication at an early date.

In view of the foregoing we think it would serve no useful purpose to rule on the merits of the pending motion to require the plaintiffs to file a more definite statement of continuing wrongdoings requiring an accounting beyond June 30, 1951. Accordingly, the motion will be denied without prejudice, in order to clear it from the record and enable the defendant to go to conference unencumbered by a prior position which may no longer be relevant to the actual state of the case.

On April 11, 1973, the defendant filed another motion, this one to dismiss for lack of jurisdiction all claims accruing after August 13, 1946.

The Commission has asserted jurisdiction over continuing wrongs that started prior to August 13, 1946, on the ground that they "accrued" before that cutoff date. Insofar as the motion seeks to have us reconsider our jurisdiction to award damages on such claims for the post-cutoff period, it will be denied. See Gila River Pima-Maricopa Indian Community v. United States, 157 Ct. Cl. 941 (1962).

Brantley Blue

Brantley Blue, Commissioner

I concur:

Margaret H. Pierce

Margaret H. Pierce, Commissioner

Commissioner Vance concurs specially.

Vance, Commissioner, concurring:

I fully concur in the opinion of the Commission, and add the following comments.

The dissent is in error in implying that the majority upholds the proposition that the United States, acting in a fiduciary capacity with respect to Indian trust funds, is subject to the same duties and obligations as a private trustee.

The Commission's opinion, while affirming that the Government is held to the most exacting fiduciary standard, declares that there are substantial differences between trusts administered by the United States and private trusts.

Such differences necessarily follow from the proposition stated at the very beginning of the opinion:

> . . . the duties of the United States with respect to the Indian tribes' moneys must be based on written law: the Constitution, treaties, and acts of Congress.

The Government's duty to make the IMPL fund productive does not stem from rules of equity made by judges or even by this Commission. It stems from acts of Congress--in particular the Act of September 11, 1841, c. 25, 5 Stat. 465.

The 1841 act is two-pronged. It requires investment of the principal of all funds held in trust by the United States <u>and</u> investment of the accruing interest. Both requirements are of equal authority. We are not free to read either out of the statute.

Certainly we are not free to disregard the entire 1841 act because it would give the Indians more interest than we think fair and honorable dealings entitle them to. Section 2, clause (5), of the Indian Claims Commission Act (25 U.S.C. § 70a(5)) applies only to claims "not recognized by any existing rule of law or equity." These, and these only, are the claims we can adjudicate according to our own conception of fair and honorable dealings. Clause (5) was intended to broaden, not restrict, the tribes' rights to recovery. Blackfeet and Gros Ventre Tribes v. United States, 127 Ct. Cl. 807, 818, 119 F. S. 161 (1954).

The measure of damages where interest as well as principal is required to be invested is stated thus in the Restatement (Second) of Trusts § 207(2) Comment:

> If the trustee is under a duty to reinvest interest received by him and accumulate it for the beneficiary, and fails to do so, he is chargeable with compound interest, since if he had not committed a breach of trust he would have received compound interest.
>
> Illustration:
>
> 1. A bequeaths $1000 to B in trust to deposit it in a certain savings bank and leave it there on deposit until C reaches the age of twenty-one and then to pay the principal and accumulated interest to C. B fails to make the deposit. The savings bank pays 3 per cent compound interest. B is chargeable with compound interest at 3 per cent.

See also G. Bogert, Trusts and Trustees § 811, note 22 (2d ed. 1962); T. Lewin, Trusts 277 (16th ed. W. Mowbray 1964); 3 A. Scott, Trusts § 207.2 (3d ed. 1967).

From 1883 to 1887, when there was no way to make a withdrawal from the IMPL fund, the dissent admits that the quoted rule applied.

But we are told that after 1887 the United States could accumulate interest or disburse principal and/or income of the IMPL fund in its discretion.

This is not our reading of the law. The 1841 act remained as mandatory after 1887 as before. The 1887 act authorized the Secretary of the Interior in his discretion to use IMPL moneys for the tribes' benefit; but the 1841 act commanded him to invest all the fund, whether consisting of principal or interest, that was not so used.

Since the disallowed expenditures were not used for tribal benefit, the 1841 act continued to operate on them as if they had remained in the IMPL fund. If they had remained there, and been invested in accordance with the 1841 act, compound interest would have been earned. The reason they were not in the fund is the Government's wrong in spending them illegally. To rule that simple interest only is due on the disallowed items would violate the basic principle of equity that one cannot benefit from his own wrong.

Since interest earned after 1887 might have been lawfully expended rather then reinvested, it might be argued that there is no basis for assuming that the interest would have been available for reinvestment, and therefore we must award only simple interest on the disallowed expenditures.

Such reasoning is unpersuasive. Equity favors the beneficiary, not the trustee. There is no more reason for assuming that the interest would have been lawfully expended than for assuming it would have remained available for reinvestment.

There can be no factual basis for either assumption. The choice must be made as a matter of law. Transactions between the United States acting as a fiduciary and the Indian tribes are to be construed favorably to the latter; doubts are to be resolved in favor of the Indians, not the Government. United States v. Shoshone Tribe, 304 U. S. 111, 117 (1938).

Indeed, we have no better means of knowing whether the principal amount of the disallowed expenditures would have remained available for investment than we have in the case of the interest. If the Secretary of the Interior had not expended them illegally, he might the next instant have expended legally, so that no interest would have been earned. Thus the dissent's argument followed to its logical conclusion would deny simple as well as compound interest. But it has been held that this is not the law where moneys are improperly withheld from an interest-bearing fund. Peoria Tribe v. United States, 390 U. S. 468 (1968); United States v. Blackfeather, 155 U. S. 180 (1894).

Such an argument would not only repeal the 1841 act's requirement for reinvestment of interest but its requirement for investment of principal

I have searched for authority on the question of whether the measure of damages for failure to reinvest accruing interest is affected by the mere existence of a legal alternative to reinvestment, even if the trustee did not avail himself of it. Another way of stating the question is, "Can the trustee reduce his damages from compound interest to simple interest because the trust instrument, or the law, gave him an option, which he did not exercise, of expending the interest rather than investing it?" The weight of such authority as I have discovered is in the negative.

In Fowler v. Colt, 22 N. J. Eq. 44 (1871), a testator directed that $40,000 be held in trust for petitioner "to be paid to him when he arrived at the age of twenty-five years, with the increase thereon by accumulation." Where the executor-trustee never undertook administration of the trust, compound interest was awarded despite a codicil which permitted use of the interest for petitioner's support and education before the latter's twenty-first birthday and directed payment of accruing interest to him between his twenty-first and twenty-fifth birthdays.

In Re Emmet's Estate, 17 Ch. D. 142 (1881), the testator provided a trust fund for his brother's children. Each child was to get a share upon attaining 21. In the meantime, the fund was to be invested, and the income applied "in, for, or towards the maintenance, education, or advancement of such child or children respectively, and the surplus, if any shall accumulate to and become part of the original share." The trustee mingled the assets with his own, and did not pay over to the plaintiff when the latter became 21.

Vice Chancellor Hall held (at page 149):

> . . . After a child attains twenty-one there is no duty undischarged, except to hand over to the child the fund with the accumulations. The trustee did not so hand it over, nor did he explain to the child that he was entitled to call for and have transferred to him the fund, with the accumulations upon it, in his hands, but he left things in exactly the same position as they were in when the child attained twenty-one. Can I then allow

> a trustee, under such circumstances, to say, 'I am, now that the child has attained twenty-one, holding the fund on a different trust, which does not require any accumulation at all, but merely makes me liable for simple interest; and I can keep it in my hands and use it, and only charge myself with simple interest?' That would be inconsistent with the duties the trustee has undertaken. The accumulations should have gone on until the trustee transferred the fund. In my opinion, if he does not hand it over when he ought to do, he must be taken to be holding it still on the same trust and subject to the same obligations as before.

Equity and good conscience, dominant principles in these accounting cases, as well as the plain language of the 1841 act, compel us to award compound interest.

But the act of Congress governs, and only the majority opinion follows it.

John T. Vance, Commissioner

Yarborough, Commissioner, dissenting:

The principal conclusion of the majority decision -- that Indian trust funds should have been made productive -- is one that seems well justified and one I fully support. However, the rationale upon which I support it differs somewhat from the statutory construction ground focused upon by the majority. Furthermore, I would propose a substantially different final result because, I submit, the majority's position with respect to the appropriate measure of damages is erroneous.

The argument of the majority opinion is, simply stated, that the 1841 Act requiring that all trust funds be made productive applies to the IMPL funds created in 1883. The 1841 Act unquestionably is an explicit direction that all trust funds be made productive. The 1883 Act creating the IMPL funds and requiring certain proceeds of Indian reservation lands to be deposited in the Treasury of the trustee is not inconsistent with the 1841 Act. The command of the 1883 Act creating the IMPL funds goes only so far as to collect, credit, and deposit these funds. The 1841 Act's requirement that trust funds be made productive becomes operative after the 1883 Act's obligation is satisfied and the funds are on deposit. To this extent, then, there is no implied repeal of the 1841 Act by the 1883 Act; the Acts are not, to this extent, inconsistent.

While I thus have no quarrel with that part of the majority's construction of the 1841 Act, I am not convinced that the proper result in this case depends upon finding that the source of the Government's obligation to make productive the Indian trust funds held by it lies within the direction of the 1841 Act. The 1841 Act, it is submitted, imposes only the ordinary obligation of a trustee to make trust funds productive. I would suggest that such an obligation exists whether or not a specific statutory direction is found. If the phrase "fair and honorable dealings" of the Indian Claims Commission Act has any meaningful content at all as a standard of conduct, it means surely that where the Government collects and controls the disbursement of funds clearly belonging to an Indian tribe, it is responsible for dealing with those funds as prudently as an ordinary trustee. See United States v. Mason, _______ U.S. _______, 37 L. Ed. 2d 22, 93 S. Ct. _______ (1973); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Manchester Band v. United States, No. 50276-CBR (N.D. Cal., June 26, 1973). An adequate ground, and a simpler one, for the principal holding in this case -- that trust funds should have been made productive -- is found in Section 2(5) of our Act: a failure to make trust funds productive gives rise to a claim based upon fair and honorable dealings.

While the majority have found that the source of the Government's obligation to make the IMPL funds productive is the 1841 Act rather than equity's mandate that a trustee make trust funds productive, they have, in construing the intent of the 1841 Act, indicated that the probable purpose of Congress was to extend to public trust funds the rule of productivity which in 1841 was well established with respect to private trusts, "*** if such rule did not already apply ***." Repeatedly the majority opinion cites settled principles of private trust law to support the majority view of the Government's fiduciary duties with respect to Indian trust funds. Clearly the majority opinion stands for the proposition that the duties and obligations of the United States when it acts in a fiduciary capacity with respect to Indian trust funds are to be construed by reference to established principles governing the duties and obligations of a private trustee in similar circumstances. This view is, of course, perfectly compatible with recent judicial pronouncements. See United States v. Mason, supra, at 27-28; Manchester Band v. United States, supra, at 10.

If, as the majority believes (and as I agree) the United States is, with respect to such duties and obligations, equivalent to a private trustee, then it must follow that the rights and remedies of the beneficiaries of a public trust should be identical to those of beneficiaries of a private trust and that the liability of a public trustee who violates his duties and obligations should correspond to the liability of a private trustee who violates the same duties and obligations. Therefore, the United States should be subject to the same measure of damages here as would a private trustee who failed to make trust assets productive.

Section 2 of the 1841 Act speaks in terms of requiring investment of "*** all *** funds held in trust by the United States, and the annual interest accruing thereon ***." 5 Stat. 465. Interpreting the fine meaning of this language, as the majority opinion does, is, insofar as the IMPL fund is concerned, an academic exercise. Under the 1883 and 1887 Acts relating to the IMPL funds, the United States had authority to accumulate interest or disburse principal and/or income of the IMPL funds in its discretion. The majority agree that such is the meaning of these Acts. Therefore, whether the source of the Government's obligation to make the IMPL funds productive arose under the 1841 Act or under general trust law, that obligation must be construed as operating within the context of the discretionary trust created by the 1883 and 1887 Acts.[1/]

While discretion in remedy is a hallmark of proceedings in equity, in the case where a trustee fails in his duty to make trust assets productive, the overwhelming weight of authority holds that the appropriate measure of damages is simple interest year-by-year on the unproductive balance. In Barney v. Saunders, 57 U.S. 535, 542 (1853), the Supreme Court, in discussing this question, stated as follows:

> *** ***
>
> On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and willfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damages for undisclosed profits and in place of them. For mere neglect to invest, simple interest only is generally imposed. ***

1/ Between 1883 and 1887, accumulation of trust income was required. Therefore what follows is not applicable to the IMPL funds during that period.

See also Wheeler v. Bolton, 28 P. 558, 561-62 (1891); Restatement (Second) of Trusts § 207(2) (1959); A. Scott, Law of Trusts, § 207.2 (3d ed. 1967). There are specific exceptions to the rule of simple interest but none of these exceptions is applicable to the facts here. 2/ See Restatement (Second) of Trusts § 207(2), comment d. See also Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 F. 166, 180 (8th Cir. 1913), cert. denied, 229 U.S. 624 (1913).

The determination of the measure of damages rests upon the fact that the remedy is designed to place the cestui que trust "*** in the position he would have been in if the trustee had performed his duty." G. Bogert, Trusts and Trustees § 863 (2d ed. 1962). In the case of a discretionary trust, the trustee could have expended the full income annually for the benefit of the cestui que trust. Such annual disbursement would be equivalent to simple interest. Therefore, to place the cestui in the position to which the law entitles him, simple interest is awarded. Indeed that would be the limit of remedy had the defendant taken the property absolutely, and just compensation were awarded under the protection of the Fifth Amendment.

2/ The cases cited in the concurring opinion are illustrative of these exceptions. In Fowler v. Colt, 22 N.J. Eq. 44 (1871), the trustee was held liable for compound interest where by the terms of the trust he was required to accumulate. See A. Scott, Law of Trusts, § 207.2, n.5 (3d ed. 1967). In In re Emmet's Estate, 17 Ch. D. 142 (1881), the trustee mingled trust assets with his own thereby being presumed to have received a return from the trust fund so used at least equal to compound interest.

I must therefore dissent from the position of the majority and the extraordinary damages they would award.

Richard W. Yarborough

Richard W. Yarborough, Commissioner

I concur:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman