embodied in various treaties[240] and statutes[241] that preceded the General Allotment Act.

At the present time restrictions upon alienation of allotments are in general of two kinds: (1) the "trust patent" and (2) the "restricted fee."

(1) Under the General Allotment Act and related legislation,[242] the allottee receives what is called a "trust patent", the theory being that the United States retains legal title to the land. Alienation of the land, therefore, requires either the consent of the United States to the alienation or, as a prerequisite to a valid conveyance, the issuance of a fee patent to the allottee.

Section 5 of the General Allotment Act[243] provided that at the expiration of 25 years the trust should terminate and a fee patent should be issued.[244] The President, however, was given discretionary authority to extend this period,[245] and by the Act of May 8, 1906,[246] the Secretary of the Interior was given power to issue a patent in fee simple "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs." (Finally, the Act of June 25, 1910,[247] authorized the Secretary to sell trust patented lands in heirship status.)

The Act of May 8, 1906, did not in terms require the consent of the Indian allottee as a condition to the issuance of a patent in fee simple by the Secretary of the Interior. Under a deliberate policy of hastening the "emancipation" of the Indian, many fee patents were issued without Indian application and even over Indian protest.[248] Many years later the courts held that the Act of May 8, 1906, had not been properly construed, that no patent could properly issue prior to the expiration of the trust period without the consent of the Indian, and that taxes paid by the Indians upon lands thus patented without Indian consent might be recovered.[249] In the case of *United States* v. *Ferry County, Wash.*,[250] the court declared, after reviewing numerous authorities:

> The United States as trustee may not liquidate the trust without the consent of the allottees and the Act of May 8, 1906, on which defendants rely must have so intended, *U. S.* v. *Benewah County, Idaho*, 9 Cir., 290 F. 623. (P. 400.)

Congress has taken cognizance of the error involved in the assumption by the Interior Department of power to issue fee patents without Indian consent and has authorized appropriations to repay to Indians taxes paid on such lands and to repay to county authorities judgments obtained in favor of Indians paying such taxes.[251]

The Secretary's authority to sell trust patented lands was revoked, except for sales to Indian tribes and exchanges of land of equal value, by section 4 of the Act of June 18, 1934,[252] on those reservations to which that statute applies. The Secretary of the Interior, however, still has power to issue a fee patent to the holder of a trust patent in advance of the expiration of the 25-year period, at least where the allottee makes application therefor. Section 2 of the same act extended the trust period "until otherwise directed by Congress."

(2) A second form of restriction upon the alienability of allotments involves the holding of a legal fee by the allottee under a deed which prevents alienation without the consent of some administrative officer, usually the Secretary of the Interior.[253] Such tenure, for instance, is provided by various statutes dealing with allotments among the Five Civilized Tribes.[254] The acquisition of land by federal authorities for individual Indians has frequently been effected by means of these restricted deeds.[255] Section 2 of the Act of June 18, 1934,[256] extends the period of such restrictions indefinitely until Congress shall otherwise provide, but does not prohibit the termination of such period by mutual agreement between the Indian and the appropriate administrative official. Alienation of allotments held in fee simple subject to restrictions on alienation may be authorized by the Secretary of the Interior, prior to the expiration of the statutory period, under the Act of March 1, 1907.[257] Issuance of a "certificate of competency" prior to the expiration of the statutory period is authorized by the Act of June 25, 1910.[258] As in the case of trust-

---

[240] Thus, for example, Article 3 of the Treaty of September 30, 1854, with the Chippewas, 10 Stat. 1109, 1110, authorized the President to impose restrictions upon allotted lands. In *Starr* v. *Campbell*, 208 U. S. 527 (1908), it was held that these restrictions covered the disposition of timber.

[241] See Chapter 11, sec. 1.

[242] See Chapter 11, sec. 1. Also see Chapter 4, sec. 11.

[243] Act of February 8, 1887, 24 Stat. 388, 389, amended, Act of March 3, 1901, sec. 9, 31 Stat. 1058, 1085, 25 U. S. C. 348.

[244] To the effect that upon the expiration of the trust period there then remains nothing to be done but the purely ministerial duty of casting the legal title on the person or persons to whom such title belongs, see Op. Sol. I. D. M. 5379, July 14, 1921; Op. Sol. I. D. M. 5702, April 27, 1922. But *cf.* 30 L. D. 258 (1900).

[245] Act of June 21, 1906, 34 Stat. 325, 326, 25 U. S. C. 391. In *United States* v. *Jackson*, 280 U. S. 183 (1930), the Supreme Court held that presidential power under this provision extended to Indian public domain homesteads.

It has been held that when the trust period has expired it cannot be reimposed in the guise of an "extension" without express statutory authority *Reynolds* v. *United States*, 252 Fed. 65 (C. C. A. 8, 1918), revd. sub nom. *United States* v. *Reynolds*, 250 U. S. 104 (1919), on another ground; Op. Sol. I. D. M. 27939, April 9, 1935. *Cf. McCurdy* v. *United States*, 246 U. S. 263 (1918). For an example of such a statute see Act of February 26, 1927, 44 Stat. 1247, 25 U. S. C. 352.

[246] 34 Stat. 182, 25 U. S. C. 349.

[247] Sec. 1, 36 Stat. 855, amended, Act of March 3, 1928, 45 Stat. 161, amended, Act of April 30, 1934, 48 Stat. 647, 25 U. S. C. 372.

[248] See Chapter 2, sec. 3E.

[249] See Chapter 13, sec. 3B.

[250] 24 F. Supp. 399 (D. C. E. D. Wash. 1938).

[251] Act of June 11, 1940 (Pub. No. 590—76th Cong.). See, for a history of this erroneous departmental interpretation and its consequences in the field of taxation, H. Rept. No. 669, 76th Cong., 1st sess. (1939).

[252] 48 Stat. 984, 25 U. S. C. 464.

[253] The power delegated to the Secretary of the Interior to approve the alienation of restricted property cannot generally be transferred or delegated to any other governmental agency. Op. Sol. I. D. M. 25258, June 26, 1929. *United States* v. *Watashe*, 102 F. 2d 428 (C. C. A. 10, 1939).

[254] See Chapter 23, sec. 8A.

[255] The Secretary of the Interior may impose restrictions on land purchased by him for an Indian from restricted money. *United States* v. *Brown*, 8 F. 2d 564 (C. C. A. 8, 1925), cert. den. 270 U. S. 644 (1926), discussed in 39 Harv. L. R. 780 (1926) (money paid under lease of allotted lands). The underlying theory is that the Secretary's control over the funds embraces the power to invest them in land subject to the condition against alienation. A similar theory is advanced to justify the power of the Secretary to restrict lands purchased with money paid for allotted lands. See *Sunderland* v. *United States*, 266 U. S. 226 (1924) (money paid for allotted lands).

On the problem of taxation raised thereby, see Chapter 13, sec. 3D.

[256] 48 Stat. 984, 25 U. S. C. 462.

[257] 34 Stat. 1015, 1018, 25 U. S. C. 405. On the effective date of Secretarial approval of a deed, see 53 I. D. 412 (1931).

[258] Sec. 1, 36 Stat. 855, 25 U. S. C. 372.

The Circuit Court of Appeals in *Ex parte Pero*, 99 F. 2d 28 (C. C. A. 7, 1938), cert. den. 306 U. S. 643 (1939), in holding that the issuance of a certificate of competency under the Act of June 25, 1910, 36 Stat. 855, does not satisfy the requirement for the issuing of a patent in fee simple, said:

> The scope and expressed purpose of the Act of 1910 is narrow and definitely stated. The Secretary of the Interior is authorized to issue a certificate of competency to any Indian ("or in case of his death to his heirs") to whom a patent in fee containing restrictions on alienation has been, or may be issued. "And such certificate shall have the effect of removing the restrictions on alienation contained in such patent." Since the effect of removing the restrictions on a restricted patent in fee is to put the holder in the condition of one who has received a patent in fee simple "under any law or treaty." * * * Since Congress expressly provided that the Secretary of the Interior should first be satisfied that a trust allottee was competent and capable of managing his own affairs as a condition precedent to the issuance of patent in fee simple, it would seem to be doing violence to legislative intent for this court to substitute a certificate of competency for both

patented lands, however, the power of the Secretary to permit alienation was terminated with respect to tribes covered by section 4 of the Act of June 18, 1934.[259]

We have elsewhere noted how the Federal Government, through the leverage of its veto power over the alienation of tribal land, was able to impose various conditions upon the use of "tribal funds" derived therefrom.[260] In the same way, the power of administrative officials to approve or veto the alienation of allotments has been used to impose various conditions upon the manner and terms of such alienation and upon the disposition of the individual Indian moneys derived therefrom.[261]

C. PROBATE OF ESTATES

(1) *Intestate succession.*—The Secretary of the Interior is vested with statutory power to determine heirs in inheritance proceedings affecting restricted allotted lands and other restricted property [262] of an Indian to whom an allotment of land has been made (except Indians of the Five Civilized Tribes and the Osage Nation). The Secretary may issue patents in fee to heirs whom he deems "competent to manage their own affairs" [263] in cases of allottees dying intestate; may sell land in heirship status; or may partition it, if he finds that partitioning would be for the benefit of the heirs, and sell the portions of the incompetent heirs.[264]

the determination of competency and the final and essential act of issuing the patent in fee simple. And special force is added to the foregoing since the issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs. (P. 34.)

See also the Act of May 8, 1906, 34 Stat. 182; 38 L. D. 427 (1910). For a discussion of incompetency, see Chapter 8, sec. 8.

[259] 48 Stat. 984, 985, 25 U. S. C. 464.

[260] See Chapter 1, sec. 1D(2); Chapter 3, sec. 3B(2); Chapter 12, sec. 1; Chapter 15, sec. 23A.

[261] *United States* v. *Brown*, 8 F. 2d 564 (C. C. A. 8, 1925), cert. den. 270 U. S. 644 (1926); *Sunderland* v. *United States*, 266 U. S. 226 (1924).

[262] On inheritance of real property see Chapter 11, sec. 6. On inheritance of personal property see Chapter 10, sec. 10.

The power to determine the inheritance of allotted lands was inferred from section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, which imposed upon the Secretary the duty to convey a fee patent to the heirs of a deceased allottee.

The Act of August 15, 1894, 28 Stat. 286, was construed as conferring power to determine heirs upon the federal courts. See *Hallowell* v. *Commons*, 239 U. S. 506 (1916); see also *McKay* v. *Kalyton*, 204 U. S. 458, 468 (1907). This act was amended by the Act of February 6, 1901, sec. 2, 31 Stat. 760, 25 U. S. C. 346. Sec. 7 of the Act of May 27, 1902, 32 Stat. 245, 275, authorized the Secretary to approve transfer of restricted allotted lands by the heirs of such lands. This statute was construed in *Hellen* v. *Morgan*, 283 Fed. 433 (D. C. E. D. Wash. 1922) as giving the Secretary of the Interior final authority to determine heirs in such cases. See also *Egan* v. *McDonald*, 246 U. S. 227 (1918).

The Act of May 29, 1908, sec. 1, 35 Stat. 444, expressly authorized the Secretary to determine the heirs of restricted lands, except in Oklahoma, Minnesota, and South Dakota. This was amended by the Act of June 25, 1910, 36 Stat. 855, amended Act of March 3, 1928, 45 Stat. 161; Act of April 30, 1934, 48 Stat. 647, 25 U. S. C. 372, interpreted in 40 L. D. 120 (1910) (upheld as constitutional in *Hallowell* v. *Commons*, 239 U. S. 506 (1916)).

The Act of August 1, 1914, sec. 1, 38 Stat. 582, 586, 25 U. S. C. 374, empowered the Secretary to compel the attendance of witnesses in probate hearings. The Probate Regulations are expressly made inapplicable to tribes organized under the Wheeler-Howard Act insofar as they conflict with tribal constitutions and charters. 25 C. F. R. 81.62.

[263] Act of June 25, 1910, 36 Stat. 855, amended Act of March 3, 1928, 45 Stat. 161; Act of April 30, 1934, 48 Stat. 647, 25 U. S. C. 372, interpreted in 40 L. D. 120 (1910).

[264] The power to effect a partition or sale of inherited Indian land is conferred on the Secretary by the Act of June 25, 1910, sec. 1, 36 Stat. 855, as amended Act of March 3, 1928, 45 Stat. 161; and Act of April 30, 1934, 48 Stat. 647, 25 U. S. C. 372; and Act of May 18, 1916, sec. 1, 39 Stat. 123, 127, 25 U. S. C. 378. The fact that one or more of the heirs is white does not affect the Secretary's power to sell or partition their land for all the heirs. *Reed* v. *Clinton*, 23 Okla. 610, 101 Pac. 1055 (1909).

The Secretary is, in general, not bound by decree or decision of any court in inheritance proceedings affecting restricted allotted lands.[265]

The determination by the Secretary of the heirs of Indians is "final and conclusive." In the comparatively few instances in which his decision has been attacked the courts have refused to look behind his determination.[266]

In *Red Hawk* v. *Wilbur* [267] the Court of Appeals of the District of Columbia held that under the provisions of the Act of June 25, 1910, the Secretary's exercise of power is not subject to review by the courts in the absence of fraud or a showing of a want of jurisdiction, and that consequently his decision respecting the distribution of allotted lands of an Indian dying before the issuance of a patent in fee was not reviewable by the court.

In ruling that the power of the Secretary to determine the descent of lands extends to lands purchased with Indian trust funds, even though they were unrestricted prior to the purchase, the Solicitor of the Department of the Interior said:[268]

> It is clearly within the power of the Secretary of the Interior to attach conditions to sales of Indian allotted lands because such power is expressly conferred in acts authorizing such sales; that is, they are to be made subject to his approval and on such terms and conditions and under such regulations as he may prescribe. It was held in the case of *United States* v. *Thurston County, Nebraska, et al.* (143 Fed. 287), that the proceeds of sales of allotted lands are held in trust for the same purposes as were the lands; that no change of form of property divests it of the trust; and that the substitute takes the nature of the original and stands charged with the same trust. From this situation arose the practice of inserting in deeds of conveyance covering property purchased for an Indian with trust funds the nonalienation clause referred to, which is merely a continuation over the new property of the trust declared for the old or original property. For sanction of this practice see 13 Ops. A. A. G., 109; *Jackson* v. *Thompson et al.* (80 Pac., 454); and *Beck* v. *Flournoy Live-Stock and Real-Estate Co.* (65 Fed. 30).
>
> It thus being established that lands purchased with trust funds continue under the trust as originally declared and that power exists to insert in deeds covering such lands a condition against alienation and incumbrance, it follows that upon the death of an Indian for whom the property is held in trust his heirs are to be determined by the Department the same as in the case of the original property from the sale of which the purchase funds are derived. Apparently no question is raised as to the authority of the Department to determine the descent of property purchased with trust funds derived from the sale of lands previously held in trust or restricted. The question submitted has reference to lands that were unrestricted prior to purchase. The theory on which the Department and the courts have proceeded in this matter is that property purchased with trust funds becomes impressed with the trust nature of the purchase money. In this view it can make no difference whether the purchased lands are restricted or unrestricted; the authority to determine heirs is coexistent with the continuation of the trust. By the act of June 25, 1910 (36 Stat. 855), Congress conferred exclusive jurisdiction upon the Secretary of the Interior to determine the heirs of deceased Indian allottees, and this power extends not only to property held in trust but also to property on which restricted fee patents have issued, under legislation providing for "determining the heirs of deceased Indian allottees having any right, title, or interest, in any

[265] 42 L. D. 493 (1913).

[266] *First Moon* v. *White Tail*, 270 U. S. 243 (1926); *cf. Nimrod* v. *Jandron*, 24 F. 2d 613 (App. D. C. 1928).

[267] 39 F. 2d 293 (App. D. C. 1930).

Other decisions of the Secretary have also been held outside of the scope of judicial review, such as his determination of whether an Indian and his land were under federal control. *Lane* v. *United States ex rel Mickadiet and Tiebault*, 241 U. S. 201 (1916).

[268] 49 L. D. 414 (1923).

trust or restricted allotment, under regulations prescribed by the Secretary of the Interior." (*United States* v. *Bowling et al.*, 256 U. S. 484.) (Pp. 415–416.)

(2) *Wills.*—Prior to 1910 an Indian allottee could not by will devise his restricted land.

Section 2 of the Act of June 25, 1910,[269] as amended by the Act of February 14, 1913,[270] provides for the bequest of restricted funds by will, in accordance with rules prescribed by the Secretary of the Interior, and the devise of allotments "prior to the expiration of the trust period and before the issue of a fee simple patent;" but in order to be valid, the will must be approved by the Secretary either before or after the testator's death.[271]

If, for some reason, the will should not be approved by the Secretary, the property descends to those who are found by him to be heirs under the laws of the state where it is located.[272] Death of the testator and approval of the will does not release the property from the trust. The Secretary may pay the moneys to the legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit.[273]

The decision in *Blanset* v. *Cardin* [274] holds that if the will is approved by the Secretary of the Interior and such approval remains uncancelled by him, the state law of descent and distribution does not apply and the state law cannot control as to the portions the will conveys or as to the objects of the testator's bounty.

D. ISSUANCE OF RIGHTS-OF-WAY [275]

Many statutes have granted the Secretary of the Interior various duties and powers in regard to rights-of-way through Indian lands. The Act of March 3, 1901,[276] authorized the Secretary to grant permission to the proper state or local authority for the establishment of public highways through any Indian reservation or through restricted Indian lands which had been allotted in severalty to any individual Indian under any law or treaty. The Act of March 2, 1899,[277] authorized the Secretary to grant rights-of-way for railway, telegraph, and telephone lines, and town-site stations.[278] It was required that the Secretary approve the surveys and maps of the line of route of the railroad and that compensation be made to each occupant or allottee for all property taken or damage done to his land, claim, or improvement, by reason of the construction of such railroad.[279] In the absence of amicable settlement with any such occupant or allottee, the Secretary was empowered to appoint three disinterested referees to determine the compensation.[280] An aggrieved party was permitted judicial review.[281] The Secretary was also authorized to grant a right-of-way in the nature of an easement for the construction of telephone and telegraph lines;[282] to acquire lands for reservoirs or material for railroads [283] and rights-of-way for pipe lines.[284]

The necessity for the consent of the Secretary has occasionally been a major point in judicial decisions. In such a case the Circuit Court of Appeals said: [285]

> The third question can be briefly disposed of. The United States, the holder of the title to the lands in question, was not made a party to the proceedings in the state court, and consequently is not bound by those proceedings had behind its back. *Appalachian Electric Power Co.* v. *Smith* (C. C. A. 4th) 67 F. (2d) 451, 456; *Wood* v. *Phillips* (C. C. A. 4th) 50 F. (2d) 714, 717. If a roadway over the Indian lands was desired, application should have been made to the Secretary of the Interior pursuant to provision of the Act of March 3, 1901, § 4, 31 Stat. 1058, 1084 (25 U. S. C. A. § 311). A right of way could no more be acquired over these lands by proceedings against the Indians than title to lands embraced in a government forest could be tried by suit against the forester, nor than post office property could be condemned for purposes of a street by proceedings against the postmaster. In *Rollins* v. *Eastern Band of Cherokee Indians*, 87 N. C. 229, it was held that the courts of the state of North Carolina, without the consent of Congress, were without jurisdiction to entertain suit on contract against these Indians. A fortiori, the state courts, without such consent, have no jurisdiction of proceedings affecting land held by the United States in trust for the Indians. (Pp. 314, 315.)

E. LEASING

Approval of leases of restricted Indian lands is an important administrative function.[286] The Supreme Court said in *Miller* v. *McClain:* [287]

> By a course of legislation beginning in 1891 and extending to 1900, authority was conferred upon the Secretary of the Interior to sanction, when enumerated and exceptional conditions existed, leases of land allotted under the Act of 1887, and the power was given to the Secretary to adopt rules and regulations governing the exercise of the right

[269] 36 Stat. 855, interpreted in 40 L. D. 120 (1911), 40 L. D. 212 (1911), and 48 L. D. 455 (1922).

[270] 37 Stat. 678.

[271] To facilitate the adjudication of heirship, Indians over the age of 21 may dispose of restricted property by will, but the approval of the Secretary of the will is necessary before it is regarded as a valid testamentary act. The final approval of the will is not given until after the death of the decedent. 25 C. F. R. 81.54, 81.55. Prior to the death of the maker the Secretary only passes on the form of the will. Before and after the death of the testator the authority of the Secretary of the Interior is limited to the approval or disapproval of an Indian will, and he lacks authority to change its provisions. Act of June 25, 1910, 36 Stat. 855, amended Act of February 14, 1913, 37 Stat. 678. On Secretary's power to grant a rehearing, see *Nimrod* v. *Jandron*, 24 F. 2d 613 (App. D. C. 1928).

[272] Act of June 25, 1910, as amended by Act of February 14, 1913, 37 Stat. 678.

[273] See *Blanset* v. *Cardin*, 256 U. S. 319 (1921).

[274] *Ibid.*

[275] On regulations relating to rights-of-way over Indian lands, see 25 C. F. R., pt. 256. On regulations relating to the construction and maintenance of roads on Indian lands, see 25 C. F. R., pt. 261. On regulations relating to establishment of roadless and wild areas on Indian reservations, see 25 C. F. R., pt. 281.

[276] Sec. 4, 31 Stat. 1058, 1084, 25 U. S. C. 311. For a statute requiring state authorities laying out roads across restricted Indian lands to secure consent of superintendent, see Act of March 4, 1915, 38 Stat. 1188.

[277] Sec. 1, 30 Stat. 990, as amended by Act of February 28, 1902, sec. 23, 32 Stat. 43, 50, Act of June 25, 1910, sec. 16, 36 Stat. 855, 859, 25 U. S. C. 312.

[278] The Secretary had also been given many powers and duties by numerous acts granting rights-of-way through Indian territory to specific railways. See *e. g.*, Act of March 2, 1887, 24 Stat. 446.

[279] Act of March 2, 1899, sec. 3, 30 Stat. 990, 991, as amended by Act of February 28, 1902, sec. 23, 32 Stat. 43, 50, 25 U. S. C. 314. The Secretary lacks power to authorize the construction of a railroad across an Indian reservation prior to the ascertainment (and fixing) and payment of compensation as provided by statute. 19 Op. A. G. 199 (1888).

[280] *Ibid.*

[281] *Ibid.* For the power of the Secretary in the event of the failure of the railroad to complete the road on time, see Act of March 2, 1899, sec. 4, 30 Stat. 990, 991, 25 U. S. C. 315.

[282] Act of March 3, 1901, sec. 3, 31 Stat. 1058, 1083, 25 U. S. C. 319, interpreted in *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322 (1924); *City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 F. 2d 343 (C. C. A. 10, 1935), cert. den. 295 U. S. 744 (1935).

[283] Act of March 3, 1909, 35 Stat. 781, amended by Act May 6, 1910, 36 Stat. 349, 25 U. S. C. 320.

[284] Act of March 11, 1904, sec. 1, 33 Stat. 65, amended by Act of March 2, 1917, sec. 1, 39 Stat. 969, 25 U. S. C. 321.

[285] *United States* v. *Colvard et al.*, 89 F. 2d 312 (C. C. A. 4, 1937). An extended discussion of administrative consent appears in *United States* v. *Minnesota*, 95 F. 2d 468 (C. C. A. 8, 1938) pp. 471–472. The Supreme Court, in affirming the decision, 305 U. S. 382 (1939), did not consider the question of administrative consent and affirmed the case on other grounds.

[286] The congressional delegation of this power to the Secretary of the Interior has been sustained. See *Bunch* v. *Cole*, 263 U. S. 250 (1923).

[287] 249 U. S. 308 (1919).

(Acts of February 28, 1891, c. 383, 26 Stat. 794, 795; August 15, 1894, c. 290, 28 Stat. 286, 305; June 7, 1897, c. 3, 30 Stat. 62, 85; May 31, 1900, c. 598, 31 Stat. 221, 229). The general scope of the legislation is shown by the following provision of the Act of 1900, which does not materially differ from the prior acts.

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands cannot personally and with benefit to himself, occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only."

The regulations for the purpose of carrying out the power given prescribed a general form of lease to be used under the exceptional circumstances which the statute contemplated and subjected its execution and the subjects connected with it to the scrutiny of the Indian Bureau and to the express or implied approval of the Secretary. (See "Amended rules and regulations to be observed in the execution of leases of Indian Allotments," approved by the Secretary of the Interior March 16, 1905.)

The foregoing provisions were enlarged by the Act of June 25, 1910, c. 431, 36 Stat. 855, 856, as follows:

"That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior."

And the regulations of the Secretary which were adopted under this grant of power in express terms modified the previous regulations on the subject "so far as to permit Indian allottees of land held under a trust patent, or the heirs of such allottees who may be deemed by the superintendent in charge of any competency commission to have the requisite knowledge, experience, and business capacity to negotiate lease contracts, to make their own contracts for leasing their lands." * * * (Pp. 310–311.)

The right of an administrative official to withhold his consent to a contract includes, it has been held, the right to impose conditions on his approval.[288]

In discussing the approval of leases, the Supreme Court said:[289]

> The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.
>
> * * * * *
>
> We find nothing in this record to indicate that the Secretary of the Interior has exceeded the authority which the law vests in him. The fact that he has given reasons in the discussion of the case, which might not in all respects meet with approval, does not deprive him of authority to exercise the discretionary power with which by statute he is invested. *United States ex rel. West* v. *Hitchcock*, 205 U. S. 80, 85, 86.

Although powers expressly entrusted to the Secretary of the Interior to approve the alienation of restricted property cannot generally be transferred or delegated to any other governmental agency,[290] certain leasing statutes provide that the power of approval may be delegated by the Secretary to superintendents or other officials in the Indian Service,[291] and other statutes permit approval by such officials as may be designated in regulations issued by the Secretary of the Interior.[292]

In general, the consent of the Indian allottees to the leasing of land is necessary.[293] As the Assistant Secretary has said:[294]

> * * * While the powers of the Secretary of the Interior are broad, under the principle of guardianship referred to in the letter, there is no statutory provision which enables the Department to execute leases for the Indian owner of an allotment without his consent. Such consent is required, on the contrary, by statute and by the regulations for the leasing of Indian allotments. (Section 395, title 25 U. S. C.; section 3, Regulations Governing the Leasing of Indian Allotments for Farming, Grazing, and Business Purposes.) This is not a case where the heirs have not been determined, and leasing by the Superintendent is permitted by the regulations due to uncertainty in the ownership of the land, nor is it a case where a minority of the heirs refuses to lease inherited land and the Government is authorized to intervene in order that the land may be of some economic value to the Indians (section 7, Leasing Regulations). * * *

---

[288] *Sunderland* v. *United States*, 266 U. S. 226 (1924); *United States* v. *Brown*, 8 F. 2d 564 (C. C. A. 8, 1925), cert. den. 270 U. S. 644 (1926); *United States* v. *Pumphrey*, 11 App. D. C. 44 (1897); *La Motte* v. *United States*, 254 U. S. 570 (1921).

The consent of the Indian owner is generally required by statute and regulations for the leasing of Indian allotments. 25 U. S. C. 395; 25 C. F. R., subchapter Q. But see Memo. Asst. Sec'y. I. D., August 23, 1938.

[289] *Anicker* v. *Gunsburg*, 246 U. S. 110, 119, 120 (1918).

[290] Op. Sol. I. D., M. 25258, June 26, 1929. Under the Act of April 21, 1904, 33 Stat. 189, 204, a deed executed by an Indian to sell lands which had been purchased for her with restricted funds was ineffectual, and the grantees acquired no estate in the land when the deed was approved only by an assistant superintendent and not by the Secretary. *United States* v. *Watashe*, 102 F. 2d 428 (C. C. A. 10, 1939). On limits upon alienation of property, see Chapters 9, 10, and 11.

[291] Act of May 11, 1938, sec. 5, 52 Stat. 347, 348, 25 U. S. C. 396e. The Circuit Court of Appeals regarded this provision as indicative of congressional belief that his authorization was necessary for the delegation of this authority *United States* v. *Watashe*, 102 F. 2d 428, 431 (C. C. A. 10, 1939).

R. S. § 439 provides:

> The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law.

This provision was declared constitutional in *Robertson* v. *United States*, 285 Fed. 911, 915 (App. D. C. 1922).

The Circuit Court of Appeals, in *Turner* v. *Seep*, 167 Fed. 646 (C. C. E. D. Okla. 1909), in holding that the Secretary may delegate to the Assistant Secretary authority to approve leases of Indian lands and assignments thereof said:

> * * * so long as the powers so delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the Assistant Secretary is co-ordinate and concurrent with that of the Secretary. * * * (P. 650.)

In referring to this function of the Assistant Secretary of the Interior, the Supreme Court said, in *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206 (1930):

> The powers and duties of such an office are impersonal and unaffected by a change in the person holding it. (P. 217.)

[292] See *e. g.*, Act of March 3, 1921, sec. 1, 41 Stat. 1225, 1232, 25 U. S. C. 393 (leasing of restricted allotments).

[293] In holding that the superintendent of an agency cannot compel a nonconsenting heir to sign leases, the Solicitor of the Department of the Interior said:

> The letter purports to authorize the Superintendent to sign the name of nonconsenting heirs owning less than a majority in interest of the estate, in two cases: (1) Where the nonconsenting heirs "by reason of their absence from the reservation, or unknown whereabouts, cannot be reached after a reasonable effort has been made"; and (2) where the nonconsenting heirs "refuse to sign without giving good and sufficient reason for refusing."
>
> In the first mentioned case, legal authority for action by the Superintendent can probably be derived from a relation of agency between the absent heir and the Superintendent. No objection is raised to this portion of the letter. In the second case, however, such special legal justification is lacking, and full weight must therefore be given to the governing leasing statute which provides that restricted allotments "may be leased for farming and grazing purposes by the allottee or his heirs, subject only to the approval of the Superintendent * * *." (Act of March 3, 1929, 41 Stat. 1232, 25 U. S. C., sec. 393.) Unless special circumstances exist to provide a legal justification for signature by the Superintendent on behalf of protesting heirs it appears that the statute prohibits such action on his part. (Memo. Sol. I. D., August 10, 1936.)

[294] Memo of Asst. Sec'y. I. D., August 23, 1938.

In some cases Congress has laid down a policy requiring the consent of Indians to modifications of contracts affecting them.[295]

Some statutes[296] empower the Secretary to renew leases "upon such reasonable terms and conditions" as he may prescribe. In construing a provision in such a statute, the Solicitor of the Department of the Interior said:[297]

> * * * Such power obviously cannot be taken away by any act of the lessee through contract or otherwise. The only limitation to which the power is subject is that the conditions of renewal must be reasonable. The authority to determine the reasonableness of the conditions is also committed to the Secretary and in its exercise he is necessarily invested with broad discretion. That this power and authority extend to the imposition as a condition for renewal, a requirement that the operating royalty shall not exceed a figure to be determined by the Secretary to be the maximum economic royalty, I have little doubt.

[295] Timber contracts, Act of March 4, 1933, 47 Stat. 1568; Op. Sol. I. D., M. 27499, August 8, 1933.

[296] See, for example, Act of August 21, 1916, 39 Stat. 519 (Shoshone Indian Reservation).

[297] Memo. Sol. I. D., June 3, 1938.

SECTION 12. ADMINISTRATIVE POWER—INDIVIDUAL FUNDS

Statutes restricting the Indian in the use of his funds may provide for the investment of his funds under the direction of the Secretary of the Interior.[298] The statute may specify certain investments or may be more general, giving the official selective powers. In any case, he is bound strictly by the authority granted in the statute.

If the Secretary of the Interior is empowered to handle the Indian's money, he cannot create trusts transferring such property from his authority to a private agency without the specific authority of Congress.[299]

On this point Attorney General Mitchell ruled:[300]

> * * * while it has been the purpose of Congress to place the supervising control over Indian funds in the Secretary of the Interior, his control is not unlimited, but is based upon directions contained in the various statutes of Congress. I find no provision or implication in any statute to the effect that the Secretary of the Interior may delegate control of these Indian funds, while held under restrictions, to outside agencies.
>
> I regard the control and supervision over Indian funds so committed to the Secretary of the Interior and the Department of the Interior as an imposition of a specific duty by Congress, and am of the opinion that it cannot lawfully be transferred by the Secretary of the Interior to agencies outside of his Department. The suggested creation of a trust, in which the custody and control of the trust funds would be in a private trustee, would be an abdication on the part of the Secretary of the control of restricted Indian funds with which Congress has vested him. I believe that this would be improper in the absence of specific congressional authority to that end, and I do not find that such authority has been given by Congress by existing statutes. (P. 100.)

The Secretary is not authorized to make donations or gifts of Indian property,[301] nor to purchase single premium annuity policies, unless for assenting adult Indians capable of understanding the nature of the investment.[302]

The Court of Appeals after quoting with approval from the Sunderland[303] case said:[304]

> If Congress, in the exercise of its guardianship, can go to the extent approved in the Sunderland Case, we find no difficulty in applying the act here in question to the disposition of the funds in the possession of the Secretary. They came into his possession in the lawful course of his supervisory power over the lands in question, and were still in his possession at the time the act of Congress was passed. Assuming, therefore, without deciding, that technically the jurisdiction over this fund passed to the Oklahoma court with the removal of the restrictions upon the land, the court had not acquired such jurisdiction as to place the fund beyond the control and power of Congress to further restrict it in the hands of the Secretary. (P. 982.)

The authority of the Interior Dearment over individual Indian moneys is, generally a derivative authority. By virtue of the control which the Department exercises over the alienation of Indian lands and interests therein, conditions have been imposed upon the manner in which proceeds derived from such lands are to be handled. In some cases the statutes providing for the leasing or alienation of individual lands specify that the proceeds "shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."[305] Other statutes do not refer specifically to the proceeds of transactions subject to the approval of the Interior Department, but contain broad language authorizing regulations covering the transaction which is construed to permit a comprehensive supervision of the proceeds derived therefrom.[306]

Ordinarily the method of disbursement of restricted individual Indian money is governed by the regulations issued by the Department of the Interior.[307] In a few instances Congress prescribes the method and permissible purposes of such disbursement.[308] For example, the Act of March 3, 1933,[309] regulating the disbursement of restricted individual money of members of the Ute Indians of Utah was designed to direct the expenditures of the Indian moneys so as to assure permanent improvements or other expenditures which will enable the Indians to become self-supporting. It also provides:

> That in cases of the aged, infirm, decrepit, or incapacitated members their shares may be used for their proper maintenance and support in the discretion of the Secretary of the Interior.[310]

[298] See Chapter 10.

[299] Memo. Sol. I. D., September 19, 1931. See also Op. Sol. I. D., M.25258, June 26, 1929; 55 I. D. 500 (1936). The Act of January 27, 1933, 47 Stat. 777, placed under the jurisdiction of the Secretary of the Interior the funds and securities of Indians of the Five Civilized Tribes of one-half or more Indian blood until April 26, 1956. Sec. 2 authorizes the Secretary to permit,

> * * * in his discretion and subject to his approval, any Indian of the Five Civilized Tribes, over the age of twenty-one years, having restricted funds or other property subject to the supervision of the Secretary of the Interior, to create and establish, out of the restricted funds or other property, trusts for the benefits of such Indian, his heirs, or other beneficiaries designated by him, such trusts to be created by contracts or agreements by and between the Indian and incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees: * * *

For a discussion of this Act see Chapter 23, sec. 10.

[300] 36 Op. A. G. 98 (1929). If the Secretary, in violation of a statute, invests funds due to a certain class of Indians, and a loss occurs, Congress and not the Secretary may provide for a reimbursement. 16 Op. A. G. 31 (1878).

[301] Act of June 25, 1910, 36 Stat. 855. *Mott* v. *United States*, 283 U. S. 747, 751–752 (1931).

[302] 36 Op. A. G. 98 (1929).

[303] *Sunderland* v. *United States*, 266 U. S. 226 (1924).

[304] *King* v. *Ickes*, 64 F. 2d 979 (App. D. C. 1933).

[305] Act of June 25, 1910, sec. 8, 36 Stat. 855, 857, 25 U. S. C. 407 (sale of timber on allotments). And see sec. 4, 36 Stat. 855, 856, 25 U. S. C. 403 (leases of trust allotments).

[306] See, for example, Act of March 3, 1909, 35 Stat. 781, 783, 25 U. S. C. 396 (mining leases).

[307] See Chapter 10, sec. 8.

[308] Memo. Sol. I. D., September 12, 1934.

[309] 47 Stat. 1488.

[310] *Ibid.*, p. 1489.

SECTION 13. ADMINISTRATIVE POWER—MEMBERSHIP

A. AUTHORITY OVER ENROLLMENT

At various times Congress has delegated to the Department of the Interior much of its sweeping power over the determination of tribal membership.[211] During the periods when the federal policy was designed to break up the tribal organization, this power was one of the most important administrative powers, since the sharing in tribal property usually depended upon being placed upon a roll prepared by the Department or subject to its approval. At present, under the policy of encouraging tribal organization, membership problems are not usually as crucial as formerly.[212] However, they may be important for other purposes, such as determining the right to vote in a tribal election. The most important limitation on the Secretary's power[213] when the tribe is still in existence is the principle that in the absence of express congressional legislation to the contrary an Indian tribe has complete authority to determine all questions of its own membership.[214]

The power of the Secretary to determine tribal membership[215] for the purpose of segregating the tribal funds was granted by section 163 of title 25 of the United States Code,[216] which reads as follows:

> The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds * * *, and shall be conclusive both as to ages and quantum of Indian blood: *Provided*, That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin.

Treaties often provide for the payment of money to an Indian of a tribe whose membership is ascertained by an administrative authority which shall examine and determine questions of fact concerning the identity of the members.[217] Statutes also impose such duty upon the Secretary[218] or a *quasi* judicial tribunal,[219] whose determinations are subject to the approval of the Secretary of the Interior. Such enrollments are presumptively correct,[220] and unless impeached by very clear evidence of fraud, mistake, or arbitrary action they are conclusive upon the courts.[221]

B. REMEDIES

Where the determination of membership in a tribe is left to the Secretary of the Interior, his decision is final and cannot be controlled by mandamus unless his act is arbitrary and in excess of the authority conferred upon him by Congress.[222]

It has also been held that the duty imposed upon him to restore names to the tribal roll is not a mere ministerial act, but calls for the determination of issues of fact and interpretations of law, and that his decisions are not ordinarily subject to review or controlled by mandamus, even though he is wrong or may change his mind within the period allowed.[223]

For example, the Secretary of the Interior was empowered by section 2 of the Act of April 26, 1906,[224] to complete the rolls of the Creek Nation, and his jurisdiction to approve the enrollment ceased on the last day set by the statute. In *United States ex rel. Johnson* v. *Payne*,[225] the Secretary had approved the decision of the Commissioner of the Five Civilized Tribes and then reversed it and ordered the name of the petitioner stricken from the rolls. The Supreme Court said:

> * * * While the case was before him he was free to change his mind, and he might do so none the less that he had stated an opinion in favor of one side or the other. He did not lose his power to do the conclusive act, ordering and approving an enrollment, *Garfield* v. *Goldsby*, 211 U. S. 249, until the act was done. *New Orleans* v. *Paine*, 147 U. S. 261, 266. *Kirk* v. *Olson*, 245 U. S. 225, 228. The petitioners' names never were on the rolls. The Secretary was the final judge whether they should be, and they cannot be ordered to be put on now, upon a suggestion that

---

[211] See Chapter 19, sec. 4.

[212] See Chapter 10, sec. 4.

[213] The limitations on administrative power over membership are indicated by an opinion of the Circuit Court of Appeals in *Ex parte Pero*, 99 F. 2d 28 (C. C. A. 7, 1938):

> * * * Only Indians are entitled to be enrolled for the purpose of receiving allotment and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian. Moore's mother failed to be enrolled as a St. Croix Indian because she was too young, not because she was not an Indian. (Pp. 31–32.)

[214] See Chapter 7, sec. 4. In matters affecting the distribution of tribal funds and other property under the supervisory authority of the Secretary, tribal action on membership is subject to the supervisory authority of the Secretary. See Chapter 7, sec. 4; Sol. Memo. October 12, 1937; Sol. Memo. March 24, 1936. According to administrative practice, in doubtful cases the tribal action is regarded as controlling.

The Circuit Court of Appeals in *Vezina* v. *United States*, 245 Fed. 411, 415 (C. C. A. 8, 1917), said

> The law did not call for the consent of the Indians to the making of the list for allotment. That power was solely vested in the commissioners, but they wisely in the main decided to take the advice of an Indian council, * * *.

[215] Citizenship in a tribe and tribal membership are sometimes used synonymously. *Seminole Nation* v. *United States*, 78 C. Cls. 455 (1933).

The agent has the duty of preparing certain statistics concerning Indians under his charge. Sec. 4 of the Act of March 3, 1875, 18 Stat. 420, 449, 25 U. S. C. 133, provides:

> That hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance.

Sec. 9 of the Act of July 4, 1884, 23 Stat. 76, 98, 25 U. S. C. 298, provides that the Indian agent shall submit in his annual report a census of the Indians at his agency or upon the reservation under his charge, and the number of school children between the ages of 6 and 16, the number of school houses at his agency, and other data concerning the education of the Indians.

[216] Act of June 30, 1919, sec. 1, 41 Stat. 3, 9.

[217] 5 Op. A. G. 320 (1851).

[218] Act of June 4, 1920, 41 Stat. 751 (Crow). See *Cully* v. *Mitchell*, 37 F. 2d 493 (C. C. A. 10, 1930); *United States* v. *Wildcat*, 244 U. S. 111 (1917).

[219] *United States* v. *Wildcat*, 244 U. S. 111 (1917).

[220] Unless Congress confers authority upon the Secretary to inquire into the validity of the enrollment of a person whose name appears on the final rolls, the rolls must be regarded as determinative of legal membership in the tribe at the time the rolls were completed and closed. See Op. Sol. I. D., M.27759, January 22, 1935.

[221] *United States ex rel. West* v. *Hitchcock*, 205 U. S. 80 (1907). The Secretary has been held not to have the power to strike names from the roll without giving notice and an opportunity to be heard. *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). It has been held that he has power, after such notice and hearing, to strike from the rolls names which have been placed thereon through fraud or mistake. *Lowe* v. *Fisher*, 223 U. S. 95 (1912).

Determinations of the Dawes Commission were subject to attack for extrinsic fraud or mistake. *Tiger* v. *Twin State Oil Co.*, 48 F. 2d 509 (C. C. A. 10, 1931).

[222] *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). See *United States ex rel. West* v. *Hitchcock*, 205 U. S. 80 (1907).

[223] *Stookey* v. *Wilbur*, 58 F. 2d 522 (App. D. C., 1932).

[224] 34 Stat. 137.

[225] 253 U. S. 209 (1920).

the Secretary made a mistake or that he came very near to giving the petitioners the rights they claim. (P. 211).

In the absence of fraud, or arbitrary action, the courts will not issue a mandamus directed against the Secretary of the Interior if the question involves the exercise of judgment and discretion. The Supreme Court, in the case of *Wilbur* v. *United States ex rel. Kadrie*,[256] decided that the duty of determining to whom payments shall be made of certain interest annuities accruing to the Chippewa Indians rested with the Secretary of the Interior and not with the courts.

Where the Secretary has nothing but a ministerial duty to perform, the court in a proper case will award a writ of mandamus.[257]

---

[256] 281 U. S. 206 (1930). Mr. Justice Van Devanter, speaking for the Supreme Court, said:

> If at the time of the decision in 1927 the Secretary of the Interior was without power to reconsider and revoke the decision of 1919, it well may be that the relators would be entitled to the relief by mandamus which they seek.[a] But there was no such want of power. The decision in 1919 was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor. The latter was charged, no less than the former had been, with the duty of supervising the payment of the interest annuities and of causing them to be distributed among those entitled to them and no others; and if he found that individuals not so entitled were sharing in the annuities by reason of a mistaken or erroneous ruling of the former his authority to revoke that ruling and stop further payments under it was the same as if it had been his own act.[b] The powers and duties of such an office are impersonal and unaffected by a change in the person holding it. (Pp. 216–217.)
>
> * * * * *
>
> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.[c]
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.[d] But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.[e] (Pp. 218–219.)
>
> * * * * *
>
> The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all questions of law the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility, but Congress in many later acts—some near the time of the decision in question—has recognized the continued existence of the tribe.[f] This recognition was respected by the Secretary and is not open to question here.[g] With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force. (Pp. 221–222.)

[a] *United States* v. *Schurz*, 102 U. S. 378, 402–403; *Noble* v. *Union River Logging R. R.*, 147 U. S. 167, 171; *Garfield* v. *Goldsby*, 211 U. S. 249, 261–262.

[b] *West* v. *Standard Oil Co.*, 278 U. S. 200, 210; *Beley* v. *Naphtaly*, 169 U. S. 353, 361; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 181–182; *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Greenameyer* v. *Coale*, 212 U. S. 434, 442; *Parcher* v. *Allen*, 26 L. D. 34, 43; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1, 10–11. And see *Pearsons* v. *Williams*, 202 U. S. 281, 284–285.

[c] *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, 534; *United States ex rel.* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Interstate Commerce Commission* v. *Waste Merchant Ass'n*, 260 U. S. 32, 34.

[d] *Roberts* v. *United States*, 176 U. S. 221, 231; *Lane* v. *Hoglund*, 244 U. S. 174, 181; *Work* v. *McAlester-Ed cards Co.*, 262 U. S. 200, 203; *Work* v. *Lynn*, 266 U. S. 161, 168, *et seq.*, *Wilbur* v. *Krushnic*, 280 U. S. 306.

[e] *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Ness* v. *Fisher*, 223 U. S. 683, 691; *Knight* v. *Lane*, 228 U. S. 6, 13; *Lane* v. *Hickadiet*, 241 U. S. 201, 208, 209; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hull* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183–184. And see *United States ex rel.* v. *Hitchcock*, 205 U. S. 80, 86.

[f] Acts of August 1, 1914, c. 222, 38 Stat. 592; May 18, 1916, c. 125, 39 Stat. 135; March 2, 1917, c. 146, 39 Stat. 979; May 25, 1918, c. 86, 40 Stat. 572; June 30, 1919, c. 4, 41 Stat. 14; February 14, 1920, c. 75, 41 Stat. 419; November 19, 1921, c. 135, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat., P. 2, 7; March 4, 1929, c. 705, 45 Stat. 1584.

[g] *United States* v. *Holliday*, 3 Wall. 407, 419; *United States* v. *Rickert*, 188 U. S. 432, 445; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315.

The same principle has been applied to many discretionary acts of the Commissioner of Indian Affairs, 24 L. D. 323 (1897). See also *Lane* v. *Morrison*, 246 U. S. 214 (1918); *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908).

Generally a suit will fail if a subordinate officer and not the Secretary of Interior is made defendant. *Moore* v. *Anderson*, 68 F. 2d 191 (C. C. A. 9, 1933). Hence a suit to compel the superintendent of an agency to supplement the tribal rool will be dismissed because the Secretary is a necessary party. *Webster* v. *Fall*, 266 U. S. 507 (1925).

[257] *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908).