TRIBAL TRUST FUND – LITIGATION AND SETTLEMENT

HISTORY OF TRUST MANAGEMENT STATUTES AND OVERVIEW OF SIGNIFICANT CASE LAW

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HISTORICAL DEVELOPMENT OF INDIAN TRUST MANAGEMENT LAWS
ANNOTATED CHRONOLOGICAL SUMMARY

1820: Federal Government adopts administrative policy of holding tribal funds in trust. *See Misplaced Trust: The Bureau of Indian Affairs Mismanagement of the Indian Trust Fund*, H.R. Rep. 102-499 (April 22, 1992).

1837: Act of Jan. 9, 1837, § 1, 5 Stat. 135, codified at **25 U.S.C. § 152**. All moneys received from *sales of lands* ceded to United States by Indian tribes, *by treaties providing for the investment or payment to the Indians of the proceeds of lands ceded by them*, after deducting expenses of survey and sale and other expenses of fulfilling engagements contained in the treaties, *shall be paid into the Treasury* of the United States in the same manner that moneys received from sales of public lands are paid into Treasury.

Act of Jan. 9, 1837, § 2, 5 Stat. 135, codified at **25 U.S.C. § 153**. 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 the treaties] and shall be drawn from the Treasury as other public moneys are drawn therefrom, under instruction from the President.

Act of Jan. 9, 1837, § 3, 5 Stat. 135, codified at **25 U.S.C. § 157.** 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 annually laid before Congress.

Act of Jan. 9, 1837, § 4, 5 Stat. 135, codified at **25 U.S.C. § 158**. The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe and beneficial for the fund, all moneys that may be received under treaties containing stipulations for payments to the Indians, annually, of interest upon the proceeds of lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than 5 percent per annum.

NOTES: The Act of Jan. 9, 1837 requires payment of monies obtained from sales of Indian lands into the Treasury; it does not require investment of such funds, except as required by the terms of the treaties themselves. *See United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1324 (Cl. Ct. 1975) ("On January 9, 1837, Congress enacted a statute that provided that the proceeds from lands ceded by Indians to the United States should be paid into the Treasury and *if the treaties required them to be invested*, such investments were to be made under the direction of the President. By 1838, there were 13 Indian trust funds in this category and all of them were invested in state bonds. . . . In 1841, there were 28 Indian funds held in trust by the Government, all of which had been specifically designated as productive by Congress, or the President had been given authority by Congress to invest them.") (emphasis added). The *Mescalero* court held that these funds were invested because the language of the treaties called for it, not because of some independent statutory or common law obligation.

1841: Act of September 11, 1841, 5 Stat. 465, codified at **31 U.S.C. § 547a**. Be it 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 rate of interest not less than five percent per annum].

NOTES: Courts hold that this 1841 statute does not require investment of tribal trust funds. The Court in *Mescalero Apache Tribe* held that this law simply mandated that funds which were already required to be invested by treaty must be invested in *federal* securities, and not *state* stocks or bonds. *Mescalero*, 518 F.2d at 1324 ("The primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds. Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided *where* [i.e., in what kind of security] they must be invested if any statute or treaty required them to be productive. . . . ") (emphasis in original). *See also White Mountain Apache Tribe v. United States*, 20 Cl. Ct. 371, 381 (Cl. Ct. 1990) (stating "*Mescalero Apache* therefore held that the 1841 Act did not apply to the tribe's IMPL funds, but prohibited investment of United States trust funds, that were required by treaty or statute to be productive, in state bonds and required the investment to be in United States securities").

1876: Act of June 10, 1876, 19 Stat. 58, codified as **25 U.S.C. § 160**. All stocks, bonds, or other securities held by Secretary of Interior on June 10, 1876, in trust for the benefit of certain Indian tribes shall, within 30 days, be transferred to the Treasury, who shall become custodian thereof; and it shall be the duty of the Treasurer to collect all interest falling due on said bonds, stocks, and so forth, and deposit the same into the Treasury of the United States, and to issue certificates of deposit therefore, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasury 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 acts of Congress when requested to do so by the Secretary of the Interior.

1880: Act of April 1, 1880, 21 Stat. 70, Ch. 41., codified as **25 U.S.C. § 161**. Secretary of Interior is authorized to deposit, in the Treasury of the United States, any and all sums held by him on April 1, 1880, or which may be received by him, as trustee of various Indian tribes, on account of 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, . . . whenever he is in 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*.

NOTES: This law gave the Secretary the alternative to deposit funds in the Treasury rather than investing funds in federal stocks and bonds. *See Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1393 (Cl. Ct. 1975) ("Because of defaults on some bonds in which the Secretary of Interior had invested and due to declining interest rates, Congress provided by the Act of April 1, 1880, for the holding of moneys in the Treasury and the payment of interest as an alternative to investment when the Secretary of Interior is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments"). This law only governs those funds that were directed to be invested by treaty terms, or some other applicable law. It does not deal with general Indian revenues, such as those found in IMPL accounts, which were not otherwise required to be invested by law. *See*

Mescalero Apache Tribe, 518 F.2d at 1312 ("prior to 1883, IMPL funds were not extensive and were held by local Government agents. These agents disbursed these funds from time to time to meet the needs of the Indians").

1883: Act of March 3, 1883, ch. 141, 22 Stat. 590, (ultimately became **25 U.S.C. § 155**, as amended) "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."

NOTES: The *Mescalero* court explained the 1883 Act as follows: "By 1883, the IMPL funds (comprised of miscellaneous receipts from Indian reservations derived from such sources as sales of grazing leases, oil and gas leases, timber, coal, and other natural resources) had begun to increase in amount and it was decided that they should be taken from the local agents and deposited in the U.S. Treasury for the benefit of the Indians. . . . Significantly, the Act makes no mention of a duty to invest such proceeds or to pay interest thereon. . . . Pursuant to the 1883 Act, the IMPL funds were deposited in the Treasury for the first time in one common fund for all of the Indians." *Mescalero*, 518 F.2d at 1312. So, revenue funds after 1883 should have gone into the Treasury, although Tribes are not entitled to interest on those funds.

1887: Act of March 2, 1887, ch. 320, 24 Stat. 463 (ultimately incorporated in **25 U.S.C. § 155**). "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 of March 3, 1883, 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."

NOTES: "Due to a technicality in the 1883 Act, the Secretary of the Treasury would not allow the Secretary of the Interior to withdraw any of the funds [deposited pursuant to the 1883 Act] without an appropriation by Congress. . . .The 1887 amendment gave the Secretary of the Interior the authority to use the IMPL funds in his discretion for the benefit of the Indians without an appropriation by Congress. It is significant that the 1887 amendment, like the Act of 1883, did not provide for the payment of interest on IMPL funds. Actually these funds were transient in character because they were paid out from time to time to provide for the needs of the Indians. . . . It is clear that Congress did not intend to pay interest on these funds nor to require them to be invested in interest bearing stocks, bonds, or other securities." *Mescalero*, 518 F.2d at 1312-1313. So, claims in this time period would be for failure to account for tribal revenues, or failure to disburse tribal funds for benefit of Indians; i..e, disbursing them for other purposes.

1891: Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795, codified at **25 U.S.C. § 397**. Authorizing the leasing of tribal lands for grazing or mining purposes, by authority of the council speaking for such Indians, and subject to the approval of the Secretary of Interior.

1894: Act of Aug. 15, 1894, ch. 290, § 1, 28 Stat. 305, codified at **25 U.S.C. § 402**. Authorizing leasing of unallotted lands for farming purposes for up to five years.

1906: Act of June 21, 1906, ch. 3504, 34 Stat. 327, codified at **25 U.S.C. § 410**. "No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period . . . except with approval and consent of the Secretary of Interior."

1910: Act of June 25, 1910, ch. 431, § 7, 36 Stat. 857, codified as amended **25 U.S.C. § 407**. "That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct.

1910: Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857, codified as amended **25 U.S.C. § 406**. Authorizing sale of timber on Indian land held under a trust or other patent containing restrictions on alienation, with consent of Secretary of Interior. Proceeds of such sales, after deductions for administrative expenses, shall be paid to owner or owners or disposed of for their benefit under Interior regulations.

1911: Act of Mar. 3, 1911, ch. 210, § 28, 36 Stat. 1077, codified at **25 U.S.C. § 118**. "Payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law."

1916: Act of May 18, 1916, ch. 125, § 27, 39 Stat. 158, codified at **25 U.S.C. § 123**. No money shall be expended from Indian tribal funds without specific appropriation by Congress except as follows: Equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are hereby continued in full force and effect.

1918: Act of May 25, 1918, ch. 86, § 28, 40 Stat. 591, (repealed & replaced by **25 U.S.C. § 162a** in 1938). This act provided the Department of the Interior with legal authority to invest all monies held in trust for tribes. The full text of Section 28 of the Act is found at *White Mountain Apache Tribe v. United States*, 20 Cl. Ct. 371, 378 (1990). The Court described the law as follows, at 20 Cl. Ct. 378-379:

"Section 28 of the 1918 Act empowers the Secretary of the Interior to deposit tribal trust funds in interest-bearing accounts. . . . With respect to those tribal funds that were susceptible to segregation, so that it was possible to credit each member of the tribe a pro rata share, Congress directed that the accounts be accessible. . . . Section 28 provides that segregated funds should be subject to withdrawal by the Secretary as provided for under department regulations. As to all tribal funds, either segregable or non-segregable, further limitations on the authority to deposit were imposed. Tribal funds were deposited only in banks that were located in states where members of the tribe reside, that collateralized the deposits with an acceptable security, and that agreed to pay a reasonable rate of interest. An option extended to the Secretary, in lieu of deposits in state banks, was investment of tribal funds in United States Government bonds."

However, the *White Mountain Apache* court held tribes could not use the 1918 act to sue for lost interest/investment income. "The 1918 Act does not require the Secretary of the Interior to make the tribe's IMPL fund productive – it authorizes the Secretary to obtain favorable bank interest rates if

the Government is not obligated by law to pay higher rates. . . . The 1918 Act cannot be construed as an express waiver [of the government's sovereign immunity for recovery of interest]. . . . The 1918 Act does not permit an action against the Government seeking lost investment yield measurable by interest." *White Mountain Apache*, 20 Cl. Ct. at 384.

1919. Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, codified at **25 U.S.C. § 399**. Authorizing Secretary of Interior to lease any part of unallotted lands of Indian reservations for mining of metalliferous (and as of 1926, nonmetalliferous minerals), not including oil and gas. All monies received from royalties and rentals under provisions of this section shall be deposited in the Treasury of the U.S. to the credit of the Indians, which moneys shall be at all times subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress.

1920: Act of February 14, 1920, ch. 75, § 1, 41 Stat. 415, codified as amended at **25 U.S.C. § 413**. "In the sale of all Indian allotments, or in leases, or assignment of leases, covering tribal or allotted lands for mineral, farming, grazing, business or other purposes, or in the sale of timber thereon, the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests, to be paid by vendees, lessees, or assignees from the proceeds of sales: Provided, that the amounts so collected shall be covered into the Treasury as miscellaneous receipts"

1924: Act of May 29, 1924, Ch. 210, 43 Stat. 244. Authorizing Secretary of Interior, with consent of tribal council, to lease lands for oil and gas mining purposes at public auction.

1926: Act of May 17, 1926, ch. 309, § 1, 44 Stat. 560, codified at **25 U.S.C. § 155**, and amending the Acts of 1883 and 1887 discussed above. "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 imposed as to tribal funds, imposed by sections 123 and 142 [now repealed] of this title."

NOTES: This is the current version of 25 U.S.C. § 155. It broadened what revenues were deemed "Indian moneys, proceeds of labor." A publication describes the 1926 act as follows: "Subsequent [to 1883], the evolution of tribal enterprises and the growth of the Indian Service developed other tribal revenues which did not fall within the classifications specified by the 1883 statute. A 1926 Act attempted to regularize and control the source of funds which could be covered into the Federal Treasury to the credit of the tribes. The Act specified that any tribal revenues received by officials or employees of the Interior Department should be deposited to the credit of the tribe in the United States Treasury and should be made available only upon appropriation by Congress."

1926: Act of July 3, 1926, ch. 787, 44 Stat. 894, codified at **25 U.S.C. § 402a**. Authorizing leases of unallotted irrigable lands on Indian reservation for farming purposes, with consent of tribal council.

1927: Act of Mar. 3, 1927, ch. 299, § 2, 44 Stat. 1347, codified at **25 U.S.C. § 398b**. Proceeds from oil and gas leases upon lands within Executive order reservations shall be deposited in Treasury to credit of tribe and shall draw 4% interest; such funds shall be available for appropriation by Congress for expenses in connection with supervision/development of oil/gas industry and for use/benefit of Indians; provided that tribes shall be consulted regarding expenditure of funds.

1929: Act of Feb. 12, 1929, ch. 178, § 1, 45 Stat. 1164, codified at **25 U.S.C. § 161a** (as amended in 1984). "All funds with account balances exceeding $500 held in trust by the United States and carried in principal accounts on the books of the Treasury Department to the credit of Indian tribes, upon which interest is not otherwise authorized by law, shall bear simple interest at the rate of 4 percent per annum."

NOTES: "[In] 1929, . . . the Secretary of the Interior recommended to Congress that the noninterest bearing IMPL funds held by the Government for Indians be made interest bearing funds. . . . Although it appears that the Secretary of Interior had intended that the IMPL Funds would be included in the 1929 legislation, the Comptroller General ruled on May 31, 1929, that it did not because the IMPL fund was not 'carried on the books of the Treasury Department to the credit of an Indian Tribe.'" *Mescalero*, 518 F.2d at 1313-1314. *See also Cheyenne-Arapaho*, 512 F.2d at 1393 ("the statutory scheme is that Indian trust funds deposited in the Treasury are to earn interest at the rate provided in the appropriate treaty or appropriations bill, and that if no interest rate is specified, the funds are to earn four percent simple interest per year"); *see also id.*, at 1394 ("The four percent attainable by retaining the funds in the Treasury is, . . . a floor rather than a ceiling.").

1930: Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584, codified as amended at **25 U.S.C. § 161b**. "All tribal funds arising under Section 155 of this title on June 13, 1930, included in the fund "Indian Money, Proceeds of Labor" shall on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930."

NOTES: This is the first statute interpreted to expressly create a duty to invest general tribal revenues (IMPL revenues). *See Mescalero*, 518 F.2d at 1314 ("the Secretary of the Interior requested additional legislation that would make IMPL funds interest bearing. The Congress responded by enacting the Act of June 13, 1930."). *See Cheyenne-Arapaho Tribes*, 512 F.2d at 1392, fn. 2 ("A proceeds of labor account holds 'all miscellaneous revenues derived from Indian reservations, agencies, and schools, and not the result of the labor of any member of such tribe. 25 U.S.C. § 155. Since 1930, money held in the Treasury in proceeds of labor accounts has earned four percent simple interest. 25 U.S.C. § 161b"); *see also id.*, at 1394 ("The four percent attainable by retaining the funds in the Treasury is, . . . a floor rather than a ceiling."). In *Cheyenne-Arapaho*, the Court found that the U.S. had a duty to maximize tribal income; the Secretary was authorized to invest tribal funds outside of the Treasury, to the extent superior rates could be obtained, as early as 1918. As of 1930, when Congress mandated the IMPL funds to bear interest, the Secretary had a fiduciary duty to maximize this income. The Secretary's investment authority became broader later on, but as of 1930, the Secretary breached its duty if it failed to make the tribes' trust funds as "productive as legally and practically possible."

1933: Act of March 1, 1933, ch. 158, 47 Stat. 1417, codified at **25 U.S.C. § 413**. "The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: Provided, that the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds."

1934: Passage of Indian Reorganization Act, June 18, 1934, 48 Stat. 984. *See* 25 U.S.C. § 476e (vesting tribes adopting IRA constitutions with authority to prevent disposition of tribal assets without tribal consent); 25 U.S.C. § 477 (authorizing tribes with approved IRA charter to dispose of trial property).

1937: Comptroller General Opinion, June 30, 1937. The Comptroller General, on June 30, 1937, issued an opinion stating that tribes organized pursuant to the Indian Reorganization Act were to have greater control over funds derived from tribal resources, and held that tribal funds could be put into local depositories if provided for under the terms of the tribal constitution, rather than depositing the funds in the Treasury or a government depository.

1938: Act of May 11, 1938, ch. 198, § 5, 52 Stat. 348, codified at **25 U.S.C. § 396a-g; Indian Mineral Leasing Act**. Authorizing leases of unallotted tribal lands within any Indian reservation or lands owned by any tribe under Federal jurisdiction, with approval of Secretary and tribal council; The Secretary of Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

NOTES: *United States v. Navajo Nation,* 537 U.S. 488 (2003) held that coal leasing provisions of Indian Mineral Leasing Act do not create *Mitchell II* fiduciary duties enforceable in action for breach of trust; IMLA placed primary responsibility for coal leasing with the tribe, restricting Secretary's role to approval of leases and promulgation of regulations governing mining operations. Case did not deal with other mineral statutes such as Indian Mineral Development Act, or 25 U.S.C. § 399; *See also Shoshone Indian Tribe v. United States*, 56 Fed. Cl. 639, 646 (2003) (holding that oil and gas provisions of IMLA do create enforceable fiduciary duties under Mitchell II); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986) (same).

1938: Act of June 24, 1938, ch. 648, 52 Stat. 1037, codified as amended at **25 U.S.C. § 162a(a)**. (repealing the Act of May 25, 1918). Secretary of Interior is authorized to withdraw from U.S. Treasury and to deposit in banks selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law, to pay interest at higher rates than can be procured from the banks. . . . No tribal money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefore in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, or insured by Section 12 B of the Federal Reserve Act; . . . provided further that the Secretary of the Interior if he deems it advisable and for the best interest of the Indians, may invest trust funds of any tribe in any public-debt obligations of the United States and in any

bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States.

NOTES: The 1938 Act provided broader authorization to invest tribal trust funds, to obtain better returns. This Act repealed the authority originally provided in the Act of 1918. Act authorized investment by deposits in commercial banks, savings and loan associations, credit unions, public debt obligations of the United States, or other obligations which are guaranteed as to both principal and interest by the United States. Commercial banks which hold these funds as deposits must pledge collateral securities guaranteed as to both interest and principal by the United States.

1946: Act of August 9, 1946, ch. 929, § 1, 60 Stat. 962, codified at **25 U.S.C. § 403b**. Authorizing the lease of any restricted Indian lands in Washington State for religious, educational, recreational, business, or public purposes, including airports, experimental stations, stockyards, warehouses, grain elevators, etc.

1955: Act of August 9, 1955, ch. 615, § 1, 69 Stat. 539, codified at **25 U.S.C. § 415**. Providing general authorization for lease of restricted Indian lands for public, religious, educational, recreational, residential, or business purposes, including development or utilization of natural resources, grazing, farming, all with approval of the Secretary. (Indian Long Term Leasing Act)

1964: Act of April 30, 1964, Pub. L. 88-301, 78 Stat. 186, codified as amended **25 U.S.C. § 407**. "The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of Interior, and the proceeds from such sales, after deductions for administrative expenses, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct."

1966: BIA headquarters adopts its first formal investment program and policy. Prior to this date, from 1930 through 1966, most tribal funds were maintained in Treasury and paid 4% interest pursuant to authority of 25 § 161a/161b. *See Misplaced Trust,* at fn. 17.

1968: May 3, 1968, opinion of the Associate Solicitor for Indian Affairs, providing complete listing of bonds and notes eligible for investment under Section 162a, cited in *Cheyenne-Arapaho*, 512 F.2d at 1395, fn. 10. Authorized alternative investments include (1) Export-Import participation certificates; (2) Federal National Mortgage Association participation certificates issued pursuant to 12 U.S.C. § 1717(c); (3) All other obligations, participations, or other instruments of the Federal National Mortgage Association by authorization of 12 U.S.C. § 1723c; (4) Debentures of the Federal Housing Administration issued pursuant to 12 U.S.C. § 1710(d); (5) Farm loan bonds issued by federal land banks, 12 U.S.C. § 941; (6) Obligations of the Federal Home Loan Banks, 12 U.S.C. § 1435; (7) Debentures of the Federal Intermediate Credit banks, 12 U.S.C. § 1045; (8) Debentures of the banks for cooperatives, 12 U.S.C. § 1134m; (9) Bonds, notes, and other evidences of indebtedness of the Tennessee Valley Authority by authorization in 16 U.S.C. § 831n-4; (10) Notes guaranteed as to principal and interest by the Small Business Administration pursuant to 15 U.S.C. § 683(b); (11) Bonds issued by local housing authorities secured by annual contributions contracts with the United States; (12) Bonds or notes of local housing and urban renewal authorities secured by a contract or

requisition agreement with the United States. The Associate Solicitor's opinion lists other possible investments, but the Court in *Cheyenne-Arapaho* questioned whether they were proper under 162a.

1981: Act of December 23, 1981, Pub. L. 97-100, 95 Stat. 1400, codified **at 25 U.S.C. § 155b**. "Except in the case of funds held in trust for Indian tribes or individuals, the funds available for expenditure under the "Indian moneys, proceeds of labor" accounts authorized by Section 155 may be expended until September 30, 1982 for any purpose for which funds are appropriated under the subheading "Operation of Indian Programs."

1982: Act of September 10, 1982, Pub. L. 97-257, 96 Stat. 839, codified at **25 U.S.C. § 155b**. No funds shall be deposited in such "Indian money, proceeds of labor" (IMPL) accounts after September 30, 1982. Balance of funds in IMPL accounts shall be transferred to and held in escrow accounts at locations of IMPL accounts from which they are transferred. Funds in such escrow accounts may be invested under authority of section 162a. Secretary shall determine no later than September 30, 1985 (after consultation with tribes) the extent to which the funds held in such escrow accounts represent income from investment of special deposits relating to specific tribes or individual Indians. Upon such a determination, funds shall be transferred to trust accounts for such tribes. Up to 2% of funds transferred from IMPL accounts shall be available to reimburse BIA for administrative expenses. Acceptance of a determination by the Secretary and transfer of funds under this provision shall constitute a complete release and waiver of any and all claims by beneficiary against Unitd States relating to unobligated balance of IMPL accounts as of close of business on September 30, 1982. Between October 1, 1985 and September 30, 1987, funds remaining in escrow accounts may be expended subject to approval of Secretary for any purpose authorized under section 13 of this title. Unobligated balances of such escrow accounts as of close business on September 30, 1987 shall be deposited into miscellaneous receipts of Treasury.

1982: Act of December 22, 1982, Pub. L. 97-382, 96 Stat. 1938, codified at **25 U.S.C. § § 2101-2109**. Authorizing any Indian tribe to enter into agreement providing for exploration, extraction, processing, development of oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources, subject to approval of Secretary. (Indian Mineral Development Act).

1983: Act of November 4, 1983, Pub. L. 98-146, 97 Stat. 929, codified at **25 U.S.C. § 162a(b)**. Authorizing Secretary of Interior to invest any operation and maintenance collections from Indian irrigation projects and revenue collections from power operations on Indian irrigation projects in (1) any public debt obligations of the United States; (2) any bonds, notes, or other obligations which are unconditionally guaranteed as to both principal and interest by the United States; or (3) any obligations which are lawful investments for trust funds under authority or control of United States. Authorizing Secretary of Interior to use earnings from investments under this subsection to pay operation and maintenance expenses of project involved.

1984: Act of October 4, 1984, Pub. L. 98-451, § 1, 98 Stat. 1729, codified at **25 U.S.C. § 161a(a)**. "All funds held in trust by the United States and carried in principal accounts on books of United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at request of Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved. . . . and bearing interest rates determined by the Secretary of the Treasury, taking into

consideration current market yields on outstanding marketable obligations of the United States of comparable maturities."

1988: Act of October 31, 1988, Pub. L. 100-580, § 13, 102 Stat. 2936, codified at **25 U.S.C. § 407**. "Under regulations prescribed by the Secretary of Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under Section 413, the proceeds of the sale shall be used: (1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or (2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned."

1990: Act of November 28, 1990, Pub. L. 101-630, 104 Stat. 4532, codified at **25 U.S.C. § 3101-3119**. National Indian Forest Resources Management Act. Authorizing withholding of reasonable deduction from gross proceeds of sales of forest products harvested from Indian lands; authorizing direct payments to tribal bank account from purchaser of forest products (§ 3107)

1990: Act of November 29, 1990, Pub. L. 101-644, § 302, 104 Stat. 4667, codified at **25 U.S.C. § 162a(c)**.
"Notwithstanding 25 U.S.C. § 162a(a), the Secretary of the Interior, at request of any Indian tribe, in the case of trust funds of such tribe, is authorized to invest such funds, or any part thereof, in guaranteed or public debt obligations of the United States or in a mutual fund, otherwise known as an open-ended diversified investment management company if (A) the portfolio of such mutual fund consists entirely of public-debt obligations of the United States, or bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, or a combination thereof; (B) the trust funds to be invested exceed $50,000; (C) the mutual fund is registered by the SEC; and (D) the Secretary is satisfied with respect to the security and protection provided by the mutual fund against loss of principal of such trust funds.

1992: Publication of Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H. R. Rep. 102-499, April 22, 1992.

1993: Act of December 3, 1993, Pub. L. 103-177, 107 Stat. 2011, codified at **25 U.S.C. § 3701-3745**, American Indian Agricultural Resource Management Act.; authorizing agricultural leasing. BIA regs state that lease payments may be made either to BIA or directly to the Indian landowners, if specified in the lease. 25 CFR § 162.226.

1994: Act of October 25, 1994, Pub. L. 103-412, 108 Stat. 4241, codified in part **25 U.S.C. § 161a(b)**. Section 161a(b) is exactly the same as 161a(a), except for the last word, which is "securities" in (b), and "maturities" in (a). The last sentence of 161a(b) reads ". . . and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities."

Act of October 25, 1994, Pub. L. 103-412, 108 Stat. 4240/4241, codified in part **25 U.S.C. § 162a(d)**.
Listing Secretary's duties in context of proper discharge of trust responsibilities of United States; including (1) providing adequate systems for accounting for and reporting trust fund balances; (2)

providing adequate controls over receipts and disbursements; (3) providing periodic, timely reconciliations to assure accuracy of accounts; (4) determining accurate cash balances; (5) preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis; (6) establishing consistent, written policies and procedures for trust fund management and accounting; (7) providing adequate staffing, supervision, and training for trust fund management and accounting; (8) appropriately managing natural resources located within boundaries of Indian reservations and trust lands. *See also* 25 U.S.C. 4001, et seq., for other provisions of Trust Fund Reform Management Act., requiring accounting for all funds held in trust for tribe deposited or invested pursuant to § 162a., authorizing tribes to withdraw funds from trust to manage themselves, creating office of special trustee, requiring reconciliation of tribal trust accounts.

2005: Act of August 2, 2005, Pub. L. No. 109-54, 119 Stat. 519 (Interior Dep't Appropriations Act)

Providing that "the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss."

NOTES: This language was included in Interior Department Appropriations Acts, beginning in 1990. The effect of the language is that claims concerning "losses to or mismanagement of trust funds" do not accrue until the accounting has been provided. This includes claims that would have accrued prior to August 13, 1946, the cutoff for claims in the Indian Claims Commission. *Shoshone Indian Tribe v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) (holding that the language of the Appropriations Acts cover any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing under existing contracts; however claims for mismanagement of a trust asset (e.g., failure to obtain or negotiate maximum price for resource/asset) are not covered by language of Appropriations Act so standard six-year statute of limitations applies to asset mismanagement claims); *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500 (2011) (rejecting United States' motion to dismiss claims that accrued prior to August 13, 1946, because the language in the Appropriations Acts stated that statute of limitations on such claims would not commence to run until tribal plaintiff received a meaningful accounting); *Shoshone Indian Tribe v. United States*, 71 Fed. Cl. 172 (2006) (allowing Tribe to amend petitions to include claims for damages suffered prior to August 13, 1946 based on losses resulting from United States' alleged failure to collect monies owed under approved leases, because such claims qualify as "losses to . . . trust funds" under the Appropriations Acts); *Osage Tribe of Indians v. United States*, 57 Fed. Cl. 392 (2003) (the language of the Interior Appropriations Acts shows "the intent of Congress to allow Indian tribes to file tribal trust fund mismanagement claims within six years after an accounting of the trust fund is furnished to the Tribe no matter when the mismanagement may have occurred").

2005: Act of March 19, 2002, Pub. L. No. 107-153, 116 Stat. 79, as amended by the Act of December 30, 2005, Pub. L. 109-158, 119 Stat. 2954

Providing that "[n]othwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying any statute

of limitations, any report provided to or received by an Indian tribe in response to section 304 of the American Indian Trust Management Reform Act of 1994 shall be deemed to have been received by the Indian tribe on December 31, 2000."

NOTES: Assuming that the "reconciliation report" referenced in Pub. L. No. 107-153 qualifies as the "accounting" required by Pub. L. No. 109-154, historic claims relating to "losses to or mismanagement of trust funds" accrued on December 31, 2000 and the statute of limitations on such claims expired on December 31, 2006. Congress did not act in 2006 to amend the accrual date and, as a result, dozens of tribes filed trust mismanagement claims in late 2006 to avoid application of the statute of limitations. The standard six-year statute of limitations applies to trust mismanagement claims that accrued after December 31, 2000.

TRIBAL TRUST MANAGEMENT
COMPILATION OF SIGNIFICANT CASE LAW

UNITED STATES SUPREME COURT

United States v. Jicarilla Apache Nation, 564 U.S. ___, 131 S. Ct. 2313 (2011)

Holding: The common law fiduciary exception to the attorney-client privilege (which precludes a trustee from asserting the privilege against beneficiaries of the trust) does not apply to the general trust relationship between the United States and Indian tribes. As a result, the United States may withhold attorney-client privileged documents that relate to matters of tribal trust management.

United States v. Tohono O'odham Nation, 563 U.S. ____, 131 S. Ct. 1723 (2011)

Holding: Pursuant to 28 U.S.C. § 1500, jurisdiction is barred in the Court of Federal Claims if the plaintiff has a prior-filed suit pending against the United States in another court that is based on substantially the same operative facts, regardless of the relief sought in each suit. Thus, the Court of Federal Claims lacked jurisdiction over the Tribe's damages suit filed in the Court of Federal Claims, because of the Tribe's prior-filed suit for an accounting and other equitable relief pending in the United States District Court. Both cases dealt with the same trust assets and alleged nearly identical breaches of fiduciary duty.

United States v. Navajo Nation, 556 U.S. 287 (2009) (*Navajo II*)

Holding: Navajo's breach of trust claim relating to coal mining royalties failed where tribe failed to identify specific rights-creating or duty-imposing statutory or regulatory prescriptions that imposed fiduciary or other duties on the United States. The Tribe could not support its claim solely by showing the government's comprehensive control over coal on Indian land.

United States v. Navajo Nation, 537 U.S. 488 (2003) (*Navajo I*)

Holding: Citing *Mitchell I*, the Indian Mineral Leasing Act (IMLA), and its regulations, were not sufficient to support a substantive claim for money damages against the United States. The IMLA required Secretarial approval for coal mining leases negotiated between tribes and third parties, but did not assign a sufficiently comprehensive managerial role over coal on Indian land.

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)

Holding: The 1960 Act requiring the United States to hold the Fort Apache Military Reservation in trust for the White Mountain Apache Tribe was sufficient to support a cause of action for breach of trust and damages where the Tribe alleged that the United States had controlled and used the land, but allowed it to fall into disrepair. Citing *Mitchell II*, a statute may support a substantive claim for money damages against the United States if it "can fairly be

interpreted as mandating compensation by the . . . Government for the damages sustained." It is sufficient that a statute be reasonably amenable to the reading that it mandates a right to recovery in damages. While the premise to a Tucker Act claim will not be "lightly inferred," a "fair inference" will do.

United States v. Mitchell, 463 U.S. 206 (1982) (*Mitchell II*)

Holding: The United States may be sued for money damages for alleged breaches of trust in connection with its management of forest resources on tribal lands. Statutes and regulations relating to tribal timber management establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources and can fairly be interpreted as mandating compensation by the Government for damages sustained. All elements of a common law trust are present and, given the existence of a trust relationship, it follows that the Government should be liable in damages for the breach of its fiduciary duties.

United States v. Mitchell, 445 U.S. 535 (1980) (*Mitchell I*)

Holding: The General Allotment Act is not adequate to support a breach of trust claim for money damages against the United States relating to mismanagement of timber resources. The General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."

FEDERAL CIRCUIT COURT OF APPEALS/ UNITED STATES COURT OF CLAIMS

Shoshone Indian Tribe v. United States, 672 F.3d 1021 (Fed. Cir. 2012) (*Shoshone IV*)

Holding: The tolling provision in the Interior Appropriations Act is not applicable to claim alleging that oil and gas leases were unlawfully converted from "1916 Act" leases into "1938" Act leases, and that the Tribe would have obtained better royalty and renewal terms if the leases had properly remained as 1916 Act leases. The Court characterizes this claim as relating to mismanagement of trust assets and thus not within the scope of the Appropriations Act tolling provision, which only affected claims concerning "losses to or mismanagement of trust *funds*."

Shoshone Indian Tribe v. United States, 364 F.3d 1339 (Fed. Cir. 2004) (*Shoshone II*)

Holdings: (1) Under the Interior Appropriations Acts, claims concerning "losses to or mismanagement of trust funds" do not accrue until the Tribe receives an accounting; (2) The phrase "losses to . . . trust funds" includes losses resulting from the Government's failure or delay in: (a) collecting payments under the Tribes' resource contracts; (b) depositing the collected monies into the Tribes' interest-bearing trust accounts; or (c) assessing penalties for late payment. These claims are separate from those that address the mismanagement of trust funds once collected (which also fall within the scope of the Interior Appropriations Acts). In sum, the Appropriations Acts cover any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes under its contracts; (3) Claims alleging that the

United States breached its fiduciary duties by failing to obtain the best possible rates for sale or lease of tribal assets does not fall within the scope of the Appropriations Act language (e.g., "asset mismanagement" claims); (4) The Tribes were entitled to interest on monies that the Government was contractually obligated to collect, but did not collect or delayed in collecting, on behalf of the Tribes. "When the Government has a clear statutory fiduciary duty to collect or manage funds and further undertakes the duty to earn interest on those funds, the failure of the Government to collect and manage such funds in accordance with its obligations will result in an award of damages for that failure and an award of interest on the amount mismanaged or not collected." *Id.* at 1353.

Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl 1975)

Holdings: (1) "The fiduciary duty which the United States undertook with respect to [Indian trust] funds includes the 'obligation to maximize the trust income by prudent investment,' and the trustee has the burden of proof to justify less than a maximum return."; (2) "A corollary duty is the responsibility to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested."; (3) The 4% interest attainable by retaining funds in the Treasury is a "floor rather than a ceiling" – e.g., United States has a duty to determine whether other permissible investments offer more than 4% and, if so, to maximize the trust income through prudent investment; (4) Rejecting United States argument that the failure in investment productivity was due to the United States' policy of consulting the Indians before investing and Indian tribes' failure to respond – "the Government was duty bound to make the maximum productive investment unless and until specifically told not to do so by a tribe and until defendant also made an independent judgment that the tribe's request was in its own best interest."

COURT OF FEDERAL CLAIMS

Nez Perce Tribe v. United States, 101 Fed. Cl. 139 (2011)

Ruling: A later-filed action in another court does not divest the Court of Federal Claims of jurisdiction over an earlier-filed action under 28 U.S.C. § 1500. In other words, if a plaintiff files in the Court of Federal Claims first, and then files a second action in the United States District Court, 28 U.S.C. § 1500 does not divest the CFC of jurisdiction over the earlier-filed action. 28 U.S.C. § 1500 and the Supreme Court holding in *Tohono O'odham* is applicable only to the situation where a plaintiff files first in District Court and second in the CFC. *Compare Northwestern Band of Shoshone v. United States*, 102 Fed. Cl. 427 (2011) (dismissing, pursuant to 28 U.S.C. § 1500 and *Tohono O'odham*, trust mismanagement claims filed in Court of Federal Claims due to existence of prior filed action in United States District Court). Note: In early 2012, the Nez Perce Tribe settled its trust mismanagement claim for $34 million.

Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726 (2011)

Rulings: (1) The Court of Federal Claims has jurisdiction under the Indian Tucker Act to hear claims that the government violated its duty to maximize trust income by prudent investment; (2)

The Court also has jurisdiction to determine whether, in choosing among the alternative investments authorized by 25 U.S.C. § § 161, 161a, and 162a, the United States was obligated to consider whether pooling the funds of more than one tribe would maximize trust income; (3) The Court lacks jurisdiction to hear the Tribe's "disbursement lag" claim – the claim that the United States breached fiduciary duties by immediately removing funds from the Tribe's trust fund to cover the disbursement check before the check was actually negotiated, thereby creating a lag between the removal of funds and check negotiation during which time no income was earned on the funds. The Court found no "money-mandating" law or regulation that supported jurisdiction over the "disbursement lag" claim. Note: Jicarilla proceeded to trial on its claims in November 2011 and the Court has not yet ruled.

Osage Tribe of Indians v. United States, 97 Fed. Cl. 542 (2011)

Ruling: Awarding damages to Osage Tribe in the amount of $330,735,185.55 on breach of trust claim. This award only dealt with a portion of the Osage Tribe's case. Note: The United States and the Osage Tribe settled the case for a sum of $380 million in October 2011.

Round Valley Indian Tribes v. United States, 97 Fed. Cl. 500 (2011)

Ruling: Rejecting the United States' argument that the Round Valley Indian Tribes' claims that pre-date July 20, 1964 are barred as a result of the 1964 Indian Claims Commission award to the "Indians of California." Even if principles of claim preclusion apply, the ICC only had jurisdiction to adjudicate claims that accrued prior to or on August 13, 1946, so any final judgment entered by the ICC only applies to preclude claims that accrued prior to August 13, 1946, and would not bar claims accruing after that date.

Ruling: Rejecting the United States' argument that Section 12 of the ICCA bars claims that pre-date August 13, 1946. Congress, through language in appropriations bills, stated that the statute of limitations on tribal trust fund mismanagement claims would not commence to run until the tribal claimant was provided with a meaningful accounting. Here, the claims did not accrue until, at the earliest, December 31, 1999. Note: In 2011, the Round Valley Indian Tribes settled their trust mismanagement claims for $8.5 million.

Osage Tribe of Indians v. United States, 96 Fed. Cl. 390 (2010) (*Osage V*)

Ruling: In calculating damages owed from United States' breach of fiduciary duty to collect, invest, and deposit revenues generated from tribe's oil and gas leases, Indian tribe could rely on lists provided by major oil producer in area which showed top 50 highest priced leases for each day, as a reasonable proxy for historical offered prices. Where the trustee has failed to keep proper accounts, all doubts will be resolved against the trustee and where a lack of evidence is created by the malfeasance or misfeasance of the trustee, the plaintiff alleging breach of fiduciary duty may rely on reasonable proxies.

Shoshone Indian Tribe v. United States, 93 Fed. Cl. 449 (2010) (*Shoshone III*)

Ruling: The tolling provisions of the Interior Appropriations Act applies to both losses to and mismanagement of trust funds; thus, a claim for losses resulting from the United States' failure to timely collect amounts due and owing to an Indian tribe under a contract is covered. However, the Tribe's claim at issue here, for unlawful lease conversions, were for mismanagement of a trust asset (not a trust fund) and thus outside the ambit of the Appropriations Act tolling provisions.

Osage Tribe of Indians v. United States, 93 Fed. Cl. 1 (2010) (*Osage IV*)

Rulings: (1) Tribe may base its award of damages on reasonable estimate based on existing and available information; (2) Rejecting United States' "good faith" defense to trust fund mismanagement; (3) Rejecting United States' argument that any award should be reduced by amount of taxes that Tribe would have had to pay; (4) Rejecting United States' argument that BIA manual could not be source of standard to evaluate "deposit lag" claim (e.g., BIA manual required deposit of funds within 24 hours); (5) Rejecting United States' argument that court must analyze specific budgetary needs of the tribe during relevant time periods when evaluating underinvestment claim; instead, court relied on BIA policy stating that it would invest funds in excess of $25,000; (6) Rejecting United States' argument that it should be entitled to a credit for years in which it outperformed the investment benchmark adopted by the Court; (7) Rejecting United States' argument that Tribe could not claim compound interest on amounts not properly credited to Tribe.

Oenga v. United States, 91 Fed. Cl. 629 (2010)

Rulings: (1) Federal regulations imposed affirmative duty on United States to enforce terms of lease on behalf of tribal allottees and to take appropriate action to remedy lease violations by private oil company; (2) United States breached its duties; (3) Declining to award interest as part of award to allottees, finding no statute that would have directed damages for improper use of trust property to be deposited into trust account; rather, funds would have been paid directly to allottees.

Osage Tribe of Indians v. United States, 87 Fed. Cl. 338 (2009)

Ruling: The United States is required to copy and produce at its own expense reasonable quantities of responsive documents identified by the Osage Nation at the National Archives and Records Administration (NARA) facilities.

Ak-Chin Indian Community v. United States, 85 Fed. Cl. 397 (2009)

Ruling: United States did not comply with its discovery obligations under RCFC 34 by simply making documents at the American Indian Records Repository (AIRR) available for inspection, because documents stored at the AIRR are not maintained "in the usual course of business" as required by the rules. "In order to comply with its discovery obligations, the United States must

produce the documents, 'organized and labeled . . . to correspond to the categories in [plaintiff's] requests.'"

Osage Tribe of Indians v. United States, 75 Fed. Cl. 462 (2007) (*Osage III*)

Rulings: (1) Accepting plaintiff's approach to calculate deposit lag damages, estimating an average lag of 1.4 days, without including payments made by EFT – and not requiring a lease-by-lease calculation due to lack of available records; (2) Accepting plaintiff's reliance on Arthur Anderson data for purposes of calculating investment returns; (3) Rejecting United States' argument for a 1-day "grace period" for investment tribal funds; (4) Accepting plaintiff's argument that interest is available as part of the damages award itself.

Osage Tribe of Indians v. United States, 72 Fed. Cl. 629 (2006) (*Osage II*)

Rulings: (1) United States breached its fiduciary duty to tribe by not collecting oil royalties based on highest "offered prices"; (2) United States breached its fiduciary duty by its failure to promptly deposit royalty funds into trust accounts ("deposit lag"); (3) United States breached its fiduciary duty failing to prudently invest cash balances of income in excess of $25,000 ("underinvestment"); (4) United States breached its fiduciary duty by failing to obtain highest available investment yields on tribal funds derived from royalties ("underperformance"). "The requirement to invest Indian trust funds in the highest yielding investments available is a legal requirement mandated by the applicable statutes – here, 25 U.S.C. § § 161a and 162a – and not solely a prudential one."

Shoshone Indian Tribe v. United States, 71 Fed. Cl. 172 (2006)

Ruling: Tribe allowed to amend petitions to include claims for damages suffered prior to August 14, 1946, specifically claims alleging losses resulting from United States' failure to collect monies owed under terms of approved leases, because such claims qualify as "losses to . . . trust funds." Pursuant to the Interior Appropriations Acts, claims for losses to trust funds do not accrue until after the Tribes receive an accounting. A claim alleging the United States' failure to enforce a contract according to its terms is different than a claim that the United States failed to adequately negotiate the contract and obtain the appropriate market rate. The former claim may benefit from the provisions of the Interior Appropriations Act; the latter is a claim for asset mismanagement and may not benefit from the Act.

Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States, 69 Fed. Cl. 639 (2006)

Rulings: (1) Judgment funds, such as those awarded by the ICC as compensation for lands ceded to United States constitute "trust funds"; (2) Investment statutes, such as 25 U.S.C. § 161, 161a, and 162a provide specific and money-mandating duty on United States to invest and make Indian funds productive; however, the "exact contours of [the United States'] duty under the applicable statutes remain to be determined. The court adopts neither plaintiff's argument that the trustee has a duty to obtain 'the maximum investment return possible' nor defendant's arguments that the government has met its obligations as long as 'it had a rational basis for its actions.'"; (3)

Due to effect of Interior Appropriations Acts, distribution of judgment funds to tribe was not sufficient to commence statute of limitations.

Osage Tribe of Indians v. United States, 68 Fed. Cl. 322 (2005) (*Osage I*)

Rulings: (1) The 1906 Osage Act and associated regulations created specific and money-mandating duty on the United States to verify that all moneys due under terms of Osage mineral leases were in fact paid to the United States, in trust for Tribe, and deposited into account of Osage tribe as trust beneficiary; (2) Claims alleging failure to collect amounts contractually owed to tribe qualify as claims for "losses to . . . trust funds" and are covered by the language in the Interior Appropriations Acts which establish claim accrual date for statute of limitations purposes; (3) Denying United States' motion to dismiss investment mis-management claims but requiring further briefing on appropriate standards to evaluate United States' investment duties.

Osage Tribe of Indians v. United States, 57 Fed. Cl. 392 (2003)

Rulings: (1) Osage Tribe had standing to bring suit against United States for mismanagement of tribal trust funds derived from mineral royalties and for failure to account; (2) Tribe's claims accrued on December 31, 1999 for purposes of applying six-year statute of limitations; (3) The claim accrual provisions of the Interior Appropriations Acts also applies to claims arising prior to August 13, 1946 and the Indian Claims Commission Act does not bar adjudication of those claims. The language of the Interior Appropriations Acts shows "the intent of Congress to allow Indian tribes to file tribal trust fund mismanagement claims within six years after an accounting of the trust fund is furnished to the Tribe no matter when the mismanagement may have occurred."

OTHER COURTS

Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973)

Rulings: (1) Statutes addressing investment of Indian funds, e.g., 25 U.S.C. § 162a, entitle the plaintiff to a minimum return of 4% on its trust moneys and authorizes investment in certain authorized investment vehicles. "Where the income from short-term Government bonds was higher, the trust obligations of the Secretary would not be satisfied by depositing the money in the Treasury at 4%, but rather by investment in those short-term bonds. Similarly, if other Government securities authorized for investment pay higher rates of return and are equally safe and liquid, then the trustee is obligated to invest in those government bonds yielding the highest rate of return." (2) The Band has been damaged by the difference between the income actually received and that amount they would have received had the trustee acted as required by traditional fiduciary standards."