DEVELOPMENT OF TRIBAL TIMBER RESOURCES:
THE TRIBAL PERSPECTIVE

LOCATING THE NATIONAL INDIAN FOREST RESOURCES MANAGEMENT ACT IN THE TORTURED HISTORY OF INDIAN TIMBER MANAGEMENT

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I. *Introduction to the National Indian Forest Resources Management Act.*

The National Indian Forest Resources Management Act ("NIFRMA") was enacted as Title III of Public Law 101-630,[1] on November 28, 1990. This paper places the NIFRMA in the context of tribal timber management generally, with particular attention to the seemingly anomalous question of whether the NIFRMA changes at all the enforceable trust duties of the United States with respect to Indian timber. The paper also highlights differences between tribal beneficial ownership of timber and the rights of an ordinary private timber owner.

While NIFRMA recognizes the existence of some recurring legal problems in Indian timber management, it leaves many of them unresolved. There is much the Act does not do. For example, tribes and those who seek to work with them to develop tribal forest resources must carefully examine which beneficiaries have a right to timber proceeds, federal liability for breach of trust, and conflicts related to state taxation and application of state commercial law. Another underlying theme is the difficulty experienced by tribes because of inadequate federal funding for Indian forest management activities.

A. Outline of the NIFRMA.

Section 302 of the Act[2] states congressional findings concerning the 16 million acres of Indian forest land, the existence of the United States' trust responsibility, and the obstacles to good management of Indian forest lands.

Section 303[3] declares the purposes of the Act.

Section 304[4] contains extensive definitions for purposes of NIFRMA. "Forest land management activities," for example, are detailed in 11 subparts covering program administration, management plans, land development, protection from fire, protection from insects, damage assessments, all aspects of timber sale (which in turn has six subparts), financial assistance for Indian foresters, road improvements, and other matters. "Forest management plan," "forest product," "Indian land," "reservation," "sustained yield," and "tribal integrated resource management plan," are also *importantly* defined.

Section 305[5] directs the Secretary to undertake "forest land management activities on Indian forest land, which shall be designed to achieve" seven objectives. These goals are slightly reworded versions of the objectives found in 25 C.F.R. § 163.3.

Section 306[6] provides for the withholding from gross proceeds of sales of forest products, a forest management deduction which will not without tribal consent exceed the amount deducted prior to the Act, and can be fully used by the tribe.

Section 307[7] calls for civil penalties and regulations concerning forest trespass. Subsection (c) confers concurrent civil jurisdiction on tribes that adopt the regulations promulgated by the Secretary to enforce the provisions of this section and requires that full faith and credit be accorded such tribal court judgments in federal and state courts.

Section 308[8] provides for direct payment of forest products receipts to a tribe's nontrust bank account, thus eliminating the requirement of deposit in the Treasury and withdrawal, if the tribe so chooses.

Section 309[9] directs the Secretary to comply with tribal laws concerning Indian forest lands protection "unless otherwise prohibited by federal statutory law."

Section 310[10] permits establishment of a special tribal forest land assistance account within the tribe's trust fund account in which almost any funds may be deposited, including unobligated forestry appropriations, which must remain available until expended.

Section 311[11] directs the Bureau of Indian Affairs to establish a program of financial support to tribal forestry programs and specifies an allocation formula, funding criteria, and minimal funding.

Section 312[12] directs an assessment of Indian forest land and management programs. The Secretary is required by November 28, 1991, to enter into a contract with a nonfederal entity to assess eight aspects of Indian forest management by November 28, 1993. Periodic assessments and status reports to Congress are also required.

Section 313[13] establishes an Alaska Native technical assistance program for ANCSA Corporations to promote sustained yield management, local processing, and value-added activities.[14]

Section 314[15] establishes an Indian and Alaska Native forestry education assistance program, including at least twenty forester intern positions within the BIA, a cooperative education program to recruit promising Native students for employment as professional foresters, a scholarship program for Natives enrolled in post-secondary forestry related study, and a forestry education outreach program to stimulate interest.

Section 315[16] covers postgraduation recruitment, internship, continuing education and training programs for Indian and Alaska Native professional foresters and forester technicians, and for tribal and Bureau of Indian Affairs' forestry personnel. Programs will cover postgraduate intergovernmental internships and continuing education and training.

Section 316[17] authorizes cooperative agreements between the Department of the Interior and Indian tribes relating to job training, publication of educational materials and land and

facility improvement, without regard to whether those activities would be performed for the benefit of Indians.

Section 317[18] contains enforcement provisions for individuals who enter into an agreement for obligated service in return for financial assistance.

Section 318[19] authorizes appropriation of necessary sums.

Section 319[20] directs the promulgation of final regulations to implement NIFRMA by May 28, 1992.

Section 320[21] declares the severability of the provisions of NIFRMA.

Section 321[22] relates to the United States' trust responsibility. It states: "Nothing in this title shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom."

II. *Impetus to Passage of The National Indian Forest Resources Management Act of 1990.*

The practical difficulties of ensuring that the United States meets its trust responsibilities with respect to Indian forest lands were among the chief reasons for passage of NIFRMA. Much of the BIA infrastructure needed to accomplish forest management objectives simply did not exist before the Act. In addition, the BIA was doing little regarding forestry education assistance. Costly timber trespass was (and still is) occurring on many Indian reservations. This section discusses two other specific precursors to the National Indian Forest Resources Management Act which are reflected in provisions of the Act.

A. The Administrative Fees Controversy.

In 1920, Congress enacted legislation[23] requiring the charging of fees by the Secretary of the Interior to recover the costs of work performed for Indians, including timber sales administration. In 1933, the authority was made discretionary. The Interior Department's policy with regard to the fees varied over the years. In 1972, under pressure from tribes, the Assistant Secretary of the Interior placed a ten percent limit on the administrative fees and directed that the fee be reduced dollar-for-dollar by amounts contributed to forestry programs by tribes. Thereafter, the Bureau, working with tribes, prepared budget and use plans for tribal forest management programs to complement the Bureau programs. Tribes were reimbursed for their expenditures under tribal forestry programs.

In 1982, the Office of the Inspector General of the Interior Department and the General Accounting Office concluded that in some cases tribes had been reimbursed for costs not within the framework of the regulations. On May 5, 1982, Interior Department Solicitor William H. Coldiron dropped a bombshell, ruling that the BIA's practice of reimbursing tribal programs was unauthorized. Coldiron concluded that administrative fees are for the purpose of reimbursing the federal government for its expenses in the administration of Indian forests and such fees should be deposited into the Treasury. Indian tribes responded with outrage.

Timber owning tribes quickly formed an Administrative Fee Committee made up of attorneys, consultants and tribal officials. Strong leadership from the top of the BIA directed that the agency's practice of allowing tribal forestry departments to use administrative fee deduction be continued pending resolution of the controversy. Fact gathering, lobbying and legal research led to a request from Representative Yates, Chairman of the Subcommittee on Interior and Related Agencies, House Committee on Appropriations, that the Comptroller General of the United States review the matter. On September 27, 1982, the Comptroller General approved the handling of administrative fees as within the broad discretion of the Secretary of the Interior under 25 U.S.C. § 413. Finally, on April 15, 1983, Interior Solicitor Coldiron disavowed his own earlier opinion. He lamely noted that language in the House Report accompanying the fiscal 1983 appropriations act expressed congressional expectation that the current practice of reducing the amount of administrative fees deposited into the Treasury to the extent tribes expend those collections on forestry management be continued.

Section 3105 of Title 25 U.S.C. greatly clarifies the lawful use of forest management deduction, previously termed administrative fees. The section directs the Secretary to permit tribes to expend the deduction for forest land management activities, and prohibits payment of the deductions into general funds of the Treasury for use of the deductions to offset federal appropriations for meeting trust timber trust obligations. This section should prevent recurrence of the Coldiron episode.

B. Direct Deposit of Timber Proceeds.

Another section of NIFRMA also stems from a partially successful effort by the Solicitor's Office to settle the controversy over handling of proceeds from tribal timber sales. In 1989, the BIA came into conflict with the Fort Apache Timber Company ("FATCO"), an enterprise wholly owned by the White Mountain Apache Tribe, over handling of proceeds. FATCO harvested tribal timber pursuant to contracts entered into under 25 C.F.R. § 163.6, which obligated FATCO to pay the stumpage value of the timber to the BIA. The BIA deducted administrative expenses and deposited the remaining proceeds in the Treasury for the benefit of the tribe pursuant to 25 U.S.C. § 155. Then, pursuant to tribal requests, the BIA withdrew the funds from the Treasury and paid the proceeds to the tribe. The White Mountain Apache Tribe objected to the procedure because twenty to thirty days elapsed between FATCO's payment to the BIA and the tribe's receipt of the stumpage. Therefore, the tribe directed FATCO to make stumpage payments directly to the tribe.

A well-reasoned Solicitor's opinion concluded that the BIA and the tribe could provide by contract for direct payment of stumpage proceeds to the tribe.[(24)] The Solicitor believed that although 25 U.S.C. § 155 requires that the proceeds of timber sales be covered into the Treasury, this section was implicitly repealed by the Indian Reorganization Act. The Solicitor's opinion pointed out that 25 U.S.C. § 155 was enacted in 1883, a time, discussed *infra,* when tribes had very limited rights with respect to reservation timber. The Solicitor's opinion then reasoned that passage of the general timber statute in 1910 signified greater tribal rights and the provision of the Indian Reorganization Act in 25 U.S.C. § 466 gave tribes the authority to prevent the disposition of tribal assets without their consent, impliedly repealed 25 U.S.C. § 155. Thus, the Solicitor concluded that the practice of requiring stumpage receipts to be paid to the BIA was not

mandated by statute but was merely a discretionary provision in the timber sale contract which could be eliminated if acceptable accounting procedures were established in its stead.

The Phoenix Field Solicitor's Office ruling quickly circulated through the Central Office, leading to a memorandum to all Area Directors from the Acting Deputy to the Assistant Secretary-Indian Affairs (Operations), dated July 23, 1990, stating "[W]e believe that direct payment of receipts from the sale of timber will further tribal self-determination and strengthen tribal governments. Consequently, we request that you share this opinion with tribal governments within your jurisdiction, and provide assistance in the development of an accounting system that will accommodate tribal desires to receive direct payment."

In 25 U.S.C. § 3107, NIFRMA now clearly provides for direct payment of forest products receipts to tribes. Subsection (a) requires the Secretary to promulgate regulations providing for payment of receipts from sale of Indian forest products by November 28, 1991. These regulations have not yet been proposed. Subsection (b) directs the Secretary, when requested by a tribe, to require the purchasers of tribal timber sales to make prompt direct payments into bank depository accounts designated by the tribe.

The direct payment section of NIFRMA does more than simply codify the views of the Phoenix Field Solicitor's Office; it reflects a multifaceted balance of interests. On one hand, Congress was concerned at reports that the BIA lost or mishandled tribal timber sale proceeds and determined to require an assessment of existing procedures for "accountability for proceeds."[(25)] Also, Congress was aware of the cash flow requirements of tribes and tribal timber enterprises and wanted to avoid delays. But whether or not Congress was aware of its effect, this provision also substantially reduces the discretion of the Secretary of the Interior with respect to approval of tribal budgets, as required by 25 U.S.C. § 123c. Since Secretarial approval via the tribal budget process is required only as to tribal funds held in trust accounts, the provision allowing timber sale proceeds to go directly into bank accounts short circuits the Secretary's power. A tribal budget, which historically would include expenditures of tribal timber proceeds which had been deposited into the U.S. Treasury, can still be conditioned or delayed by the BIA, but not as to timber sale proceeds handled under NIFRMA.

III. *Ownership and Control of Indian Timber: Identifying Beneficiaries of Reservation Timber.*

While NIFRMA refers to "the lands' beneficial owners"[(26)] and also includes within the definition of "Indian tribe" the "recognized tribal government of such tribe's reservation,"[(27)] the Act wisely declines to address more generally issues of ownership and control of Indian timber. The Senate Report[(28)] hints at the extent of the problem, using the Quinault Indian Reservation as an example. It states: "The phrase 'reservation's recognized tribal government' is deliberately utilized throughout S. 1289 and this report. The phrase is necessary to avoid confusion since several distinct tribes or descendants of tribes may reside on a single reservation."[(29)] Because of the distinct legal history of each Indian reservation, there is little that Congress could have done to clarify across the board the complex matter of identifying beneficiaries of Indian reservation timber and defining control for that timber. The following sections address the legal context of ownership and control of tribal timber, within which the NIFRMA must be understood.

A. Indians as Reservation Life Tenants in the 19th Century.

Federal law on Indian tribal timber has gone through three distinct stages, starting with a broad prohibition on sale, next a restricted ability to sell dead timber, and finally, a restricted ability to sell any timber. Cases arising during the early stages remain important today for the proposition that timber sales on Indian trust land are only a permitted activity. Sales that fail to comply exactly with federal law are illegal. One of these early cases, *United States v. Cook*, illustrates the initial legal status of Indian timber.[30]

In *Cook*, the United States sued to recover the possession of logs sold from Oneida Indian lands to a non-Indian. The Court ruled that Indians had no more right to sell logs than to alienate the land itself. The Court viewed Indian rights to reservation lands, and to the timber upon them, as rights of occupancy only. This narrow view was based on rulings in *Johnson v. McIntosh*[31] and *Cherokee Nation v. Georgia*[32] that fee title to tribal lands is in the United States. In *Cook*, the Court equated the Indians' limited right to cut timber (enough to clear a reasonable amount of land) with the rights of a life tenant against a remainderman, but ruled:

The timber while standing is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be . . . .

[The timber] was cut for sale and nothing else. Under such circumstances, when cut, it became the property of the United States absolutely, discharged of any rights of the Indians therein . . . .

To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land.[33]

Since *Cook* involved timber cutting on communal lands, it was quite logical for the Court to link alienation of tribal timber to the property transfer restrictions of the Non-Intercourse Act[34], with which no party had complied. Thus, because the timber cutting went beyond the authority granted to Indians by federal law, the purchaser got no title to the logs received from Indians.

The approach of *Cook* was mirrored in the Act of March 3, 1883,[35] which provided among other things that "[t]he proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, shall be covered into the Treasury . . . ." Since Indians did not own the resources on the reservations, all revenue from those resources belonged to the United States and was properly deposited into the Treasury of the United States. Even after the General Allotment Act made the individualization of tribal or communal lands generally possible, the Attorney General determined that the rule of *United States v. Cook* also applied to Indian individuals' land allotments.[36]

The Act of June 7, 1897,[37] allowed Indian reservations in the State of Minnesota to harvest and sell dead timber, whether standing or fallen. This authority was extended to other reservations by the Act of February 16, 1889.[38] Both the 1897 and 1899 Acts authorized the adoption of regulations by the Secretary of the Interior. One of the conditions that the Commissioner of Indian Affairs imposed on timber sales under the Acts was that ten percent of

the gross proceeds derived from the sales should go to the stumpage or poor fund of the tribe from which the old, sick and otherwise helpless might be supported.[39] Thus the regulations sought to insure that the timber would provide some communal benefit in addition to the individual employment opportunities created by these Acts.

The 1889 Act met the requirements of the Non-Intercourse Act as to timber sales within its scope, and it led to many Indian timber sales as well as to widespread abuse in the Great Lakes region. For example, in *Pine River Logging & Improvement Co. v. United States*,[40] non-Indians executed a series of contracts with Indians to harvest dead timber on the Mississippi Indian Reservation. The Commissioner of Indian Affairs approved the contracts as required, and an agent of the Indian Department supervised the actual cutting.[41] The United States sued because the Indians cut, and the company received, more timber than the contracts allowed. The United States' right to recover through an action in the nature of trover was not altered by the fact that the Indians did the cutting and the Indian agent acquiesced in conduct not authorized by the 1889 Act. The Court noted that the Indian agent had been placed in charge of the operations for the express purpose of seeing that there were no violations of the contract, to protect the United States.[42] The Court stated:

[T]he Indians had no right to the timber upon this land other than to provide themselves with the necessary use for their individual use, or to improve their land (*United States v. Cook*, 19 Wall. 591), except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as *sui juris*, but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision *for the express purpose of securing the latter against the abuse of the right given by the statute. . . .*

In short, the object of these regulations was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits of the Act to the exclusion of the many.[43]

The restrictions on timber harvest contracts imposed by the 1889 Act were supplemented by general contracting restrictions passed in 1871 and 1872, which applied to many contracts with Indian tribes or Indians.[44] For example, in *Green v. Menominee Tribe*,[45] the Court applied the requirement that contracts with Indians are void unless in writing and formally executed and approved to an agreement by Indians to pay for supplies for logging operations out of proceeds received by an Indian agent from the sale of logs. Thus, supplies furnished for logging operations out of log sale proceeds were also covered by 25 U.S.C. § 81, even though the other contracting party was a licensed Indian trader.

Although the 1899 Act has not been repealed, it appears that its authority is no longer exercised. As the following sections show, broader legal authority now exists for the sale of tribal timber. However, the problem of unlawful removal of timber from Indian reservations, "sales" which do not comply with the requirements of federal law, and timber trespass generally are still of great concern to Indian tribes. The timber trespass and tighter timber sale contract administration provisions of NIFRMA may partially alleviate this long-standing problem.

B. More General Authority for Sale of Allotted and Tribal Timber -- the Act of June 25, 1910.

The administration's desire to generate tribal funds that could supplant federal appropriations, to furnish employment to Indians, and to authorize the cutting of mature timber from Indian lands led to the inclusion of sections 7 and 8 in the Act of June 25, 1910. With respect to tribal land, section 7 provided:

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: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.[46]

In the Act of June 25, 1910, Congress made a concerted effort to intensify the management and productivity of a wide variety of Indian properties and federal programs for Indians. The Act substantially amended the General Allotment Act of 1887, provided for heirship proceedings conducted by the Interior Department for deceased allottees, regulated wills made by Indians, tightened the criminal penalties for timber trespass or fire damage to Indian lands, authorized reserving Indian lands for reservoir and power purposes, authorized allottees to lease their properties, and included many other provisions.[47]

In 1911, the Interior Department promulgated detailed regulations for Indian forest management that were intended "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."[48] As the Supreme Court stated:

The [1911] regulations addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source.[49]

Although by 1910 the breakup of Indian tribal lands caused by the General Allotment Act had already led to loss of millions of acres of tribal land holdings, to some extent tribal timber land was less adversely affected than other tribal lands because of the Interior Department's view that timber land was not suitable for allotment to individuals. That view, however, was changed by *United States v. Payne*,[50] which rejected the Department's view and concluded that the applicable treaty contemplated clearing timber off lands to be cultivated, and thus that forested areas of the Quinault reservation should also be allotted to individuals. The resulting frenzy of allotments left the Quinault Nation with very little tribal forest land until recent years

C. Tighter Regulation Under the Indian Reorganization Act.

Both individual and tribal forest lands suffered from abuse of the authority granted by the 1910 Act, as well as neglect, with the result that the plight of Indian forests was among the reasons for passage of the reform-minded Act of June 18, 1934, the Indian Reorganization Act ("IRA").[51] Section 6 of the IRA provided:

The Secretary of the Interior is directed to make rules and regulations for the *operation and management of Indian forestry units on the principle of sustained-yield management*, to restrict the number of livestock grazed on Indian range units to the estimated caring capacity of such

ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.[52]

One of the key sponsors of the IRA, Representative Howard, explained that the sustained-yield requirement was intended to "assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes."[53]Similarly, John Collier, the Commissioner of Indian Affairs, testified:

We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis and the bill expressly directs that this principle of conservation shall be applied throughout.[54]

Whether or not the IRA requirement of sustained yield management halted the "slaughter" of Indian lands, it at least provoked revision of the Interior Department's General Forest Regulations in 1936. The IRA also signified Congress' assumption that tribes generally are the real owners of the reservations and reservation assets, for the Act gave tribes veto power over disposition of those assets.[55] Thereafter, the Supreme Court and the Ninth Circuit Court of Appeals, whose jurisdiction includes most remaining Indian forest lands, issued a series of decisions specifically upholding the Interior Department's contracting practices and interpretations of the regulations and generally federalizing contract disputes concerning reservation timber. The crash in timber prices that accompanied the Great Depression produced several cases upholding the Interior Department's regulations and related contract terms, particularly those establishing the measure of damages and the Interior Department's authority to make binding estimates of damages.[56]

For example, in *United States v. Algoma Lumber Co.*,[57] Algoma signed a timber sale contract with the Superintendent of the Klamath Indian School, who was acting on behalf of the Klamath Tribe pursuant to the 1910 Act. Algoma unsuccessfully attempted to recover in the Court of Claims overpayments made pursuant to those contracts. Justice Stone stated:

The action of Congress in authorizing the sale of the timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the means chosen for the exercise of the power of the government to protect the rights and beneficial ownership of the Indians. The means are adapted to that end. . . . The form of the contract and the procedure prescribed for its execution and approval conform to the long-established relationship between the government and the Indians, under which the government has plenary power to take appropriate measures to safeguard the disposal of property of which the Indians are the substantial owners. Exercise of that power does not necessarily involve the assumption of contractual obligations by the government.[58]

Since the timber contracts were not considered contracts of the United States, the Court of Claims lacked jurisdiction to return the overpayments to Algoma until special legislation was enacted for that purpose.[59]

Logging companies were not alone in challenging the Interior Department's broad interpretation of its discretion with respect to Indian forests. In *United States v. Eastman*,[60] allottees of the Quinault Indian Reservation challenged the authority of the Secretary of the Interior to impose regulations upon timber sales from allotments, particularly the

regulations providing for selective logging and for the deduction of ten percent to cover administrative expenses. The court of appeals reiterated the general rule that restraints upon alienation of Indian trust lands extend to timber and upheld the Interior Department's power to condition its consent to timber sales:

The trial court thought that the statutory power of the Secretary was limited to the veto of a sale "improvident from the standpoint of price." (34 F. Supp. 761.) But equally important is the exaction of guarantees that the price agreed upon will be paid. Essential also to a provident sale of live timber are provisions for the protection of young growth in the process of logging, stipulations relating to the permissible height of stumps . . . .

The trial judge was "impressed" with the wisdom of the selective logging principle as explained by the experts of the Indian forestry service. . . . Clearly, . . . the Department was free to take the long view. The plaintiffs themselves are but descendent of the generation which negotiated the treaty. The Secretary was not obligated to formulate a policy which would make it possible for the Indian of today to consume or lay waste his heritage without thought of his own future or the welfare of those who come after him.(61)

The sustained-yield management requirement that originated in the Indian Reorganization Act of 1934 and the BIA's interpretation prohibiting clear cutting severely limited the flexibility of managing Indian timber lands. This problem was alleviated somewhat in the Act of April 30, 1964.(62) In addition to extensive amendments relating to sales of timber on allotted lands, the 1964 amendment changed the provision of the 1910 Act regarding tribal lands to read:
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 the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to [25 U.S.C. § 413], 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.(63)

Thirty years of operations under a statute requiring sustained-yield management, and regulations requiring selective cutting had convinced the Interior Department that proper silvaculture required more flexibility:
One great need that this legislation will serve is that of modernizing timbering operations on Indian reservations. Under the 1910 law, sale of mature living and dead and down timber on tribal lands is permitted. This is not sufficient to meet present-day standards of timber harvesting in accordance with principles of sustained yield, or to permit the removal of immature trees of poor quality or undesirable species. It likewise does not cover occasional situations in which clear-cut timbering should be conducted so that land may be used for farming, recreational, or building purposes.(64)

The Interior Department's increased authority to sell timber under the 1964 amendments to 25 U.S.C. §§ 406-07 did not lead to any general revision of the regulations. However, Section 163.5(b) of Title 25 C.F.R. provides:
Clearing of large contiguous areas will be permitted only on lands that, when cleared, will be devoted to a more beneficial use than growing timber crops. This restriction shall not prohibit clearcutting when it is silvaculturally good practice to harvest a particular stand of timber by such methods and conforms with § 163.3.

This regulatory discretion to allow clearcutting in certain situations has a parallel in 25 C.F.R. § 163.4, the regulation construing the sustained yield management requirement imposed by Congress. Sustained yield does not require an even flow of products from the forest; there is substantial harvest flexibility. The regulations merely require "an approximate balance" between maximum net growth and harvest.(65)

D. Which Indian Beneficiaries Have a Right to Timber Proceeds?

The 1910 Act not only provided regulatory authority for the Interior Department to sell Indian tribal timber but also stated that "the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as [the Secretary] may direct." This provision was a radical change from the rule of *United States v. Cook*,(66) under which reservation Indians had no right to the proceeds of timber sales, but it is also consistent with the legislative intent to generate funds that would displace federal appropriations provided for the benefit of Indians. Also, the 1910 Act applied to "any Indian reservation" and thus skipped over the thorny problem of distinguishing tribal rights to executive order reservations from those in reservations created by treaty or statute, while retaining the general requirement that the forest land at issue must be a "reservation" for the benefit of Indians. While each of these aspects of the 1910 Act provided helpful clarification concerning the legal status of Indian tribal timber, they might also cause one to gloss over important distinctions which exist among types of Indian tribal lands and among particular reservations. The following sections, therefore, touch briefly on the requirement of a "reservation," and changes over time in the identity of the beneficiaries of proceeds generated from reservation timber sales.

Recently, in *Oklahoma Tax Comm. v. Potawatomi Indian Tribe*,(67) the Supreme Court rejected an attempt to distinguish between off-reservation tribal trust land and Indian reservations. Instead, relying upon *United States v. John*,(68) the Court explained that reservation status for tribal immunity purposes:

[D]oes not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."(69)

The NIFRMA also uses a broad definition of "reservation," which specifically includes public domain allotments and former Indian reservations in Oklahoma.(70) The nontechnical use of the term "reservation" in *Potawatomi*, the 1988 amendment to 25 U.S.C. § 407, discussed below, and the definition in NIFRMA make it clear that the Secretary of the Interior may conduct sales of timber on both on- and off-reservation Indian tribal trust lands.(71) None of these provisions eliminates the statute's requirement that the lands at issue be reserved or set apart for Indian purposes by some valid federal action. The underlying federal action required to meet that standard is illustrated by *Tee-Hit-Ton Indians v. United States*.(72)

In *Tee-Hit-Ton*, an Alaskan native clan of the Tlingit tribe sought compensation for the United States' sale of timber from an area of about 350,000 acres. The Court accepted the fact that the clan possessed Indian occupancy rights or "original Indian title," which might be analogous to the rights recognized in *United States v. Cook*. But while such occupancy rights are valid against third parties, the Court held that, without congressional recognition of ownership,

the clan had no rights against the United States based on a "taking" because "unrecognized" Indian title is not compensable under the Fifth Amendment. While there is no particular form for congressional recognition of Indian rights of *permanent* occupancy of land, there must be a definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

Where the *Tee-Hit-Ton* test is met and Congress has definitely intended to accord legal rights to Indians, it is plain that 25 U.S.C. § 407 applies and Indians are the beneficial owners of proceeds of timber sales under the 1910 Act. For this reason, a number of cases beginning with *United States v. Shoshone Tribe of Indians*(73) have held that Indians had full beneficial ownership of timber on reservations which, by treaty or statutory provisions, were plainly intended for the permanent occupation of the tribes. In *Shoshone*, a treaty reserved lands for the "absolute and undisturbed use and occupation" of the Shoshone tribe. Accordingly, the Shoshones were compensated for the value of the timber when the United States gave a portion of the reservation to a different tribe. In that case, the Court distinguished *United States v. Cook* as *not* involving the tribe's "right of occupancy in perpetuity."(74) Similarly, a companion case, *United States v. Klamath Tribes*,(75) relied upon the fact that the Klamath reservation was set apart as tribal lands under a treaty and timber harvest for the Indians' benefit was anticipated.

In *United States v. Algoma Lumber Co.*,(76) another case involving the Klamath reservation, the Court ruled:

Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians.(77)

The Court's reference in *Algoma* to "established principles applicable to land reservations created for the benefit of the Indian tribes," might be misunderstood if not read in connection with *Shoshone, Klamath* and the other cases cited by the Court. While permanent Indian occupancy of a reservation is envisioned in many acts of Congress or treaties, and was present in *Algoma*, that form of tribal ownership is far from universal. Thus, the terms of the basic documents concerning an Indian reservation must be examined in every case in order to conclude that the lands at issue come within these "established principles."(78)

An additional limit on tribes' beneficial ownership of proceeds of Indian timber sales arises from Congress' authority to clarify or change the identity of Indian beneficiaries of tribal property. For example, the 1964 amendments to the Indian timber statutes, discussed above, changed the identity of the beneficiaries of net proceeds from tribal timber sales from "Indians of the reservation" to "Indians who are members of the tribe or tribes concerned." Testifying in support of that amendment, a Bureau of Indian Affairs witness stated:

We have a slight technical correction in who is a member of the tribe and who is entitled to share. The present law says "Indians of the reservation." Today that really does not assign anybody. Actually members of the tribe share in the proceeds of the sale of tribal property. So we propose to change the statute. And that is what we have been doing all the time anyway. We propose to change the statute to read, "Indians who are members of the tribe." So when we sell

the tribe's timber and go to divide up the money we will give to the members of the tribe and not Indians of the reservation.[79]

That change had two aspects: it permitted off-reservation tribal members to share in timber sale proceeds and it clarified that the identity of beneficiaries would be determined by normal tribal standards of enrollment. As the Senate put it, "This change provides a better reference to the Indians entitled to share in the financial benefits flowing from such timber sales."[80]

In other contexts, Congress has frequently and without liability changed the identity of the Indian beneficiaries of tribal resources, acting under the principle that individual Indians do not hold vested severable interests in unallotted tribal lands and moneys.[81] However, while the Bureau of Indian Affairs may have thought it clear that the 1964 amendments to 25 U.S.C. § 407 prevented any Indians except tribal members from sharing in tribal timber sale proceeds, the Federal Circuit Court of Appeals held otherwise in *Short v. United States ("Short III")*.[82] The court held that the 1964 revision "was obviously not designed to cut off existing rights of Indians of a reservation" but rather to include Indians "who happen to reside elsewhere than on the reservation."[83] Therefore, *Short III* interpreted the tribal timber statute as follows:

But it is clear to us that Congress, when it used the term "tribe" in this instance, meant only the general Indian groups communally concerned with the proceeds -- not an officially organized or recognized Indian tribe -- and that the qualified plaintiffs fall into the group intended by Congress.[84]

While that holding allowed the court to adhere to its view that nontribal members associated ancestrally with the Hoopa Valley Indian Reservation in California had a right to share in distributions of tribal timber proceeds, it also created consternation among other timber-owning tribes on reservations where Indians who were not enrolled tribal members might believe themselves to be "communally concerned" with timber proceeds. To alleviate that problem, Congress amended 25 U.S.C. § 407 once again in 1988 to read:

Under regulations prescribed by the Secretary of the 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 of this title, 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.[85]

The accompanying Senate Report explained that the interpretation of *Short III* "could cause mischief if applied to other Indian tribes," and went on to say that the "amendment simply makes clear that revenues from tribal timber resources are to be used solely for the tribes located on such reservation and, through such tribes, their members."[86]

In summary, the evolution in federal law from a broad prohibition on sales of Indian timber to a statute granting general regulatory authority to harvest reservation timber (usually, but not always, on a sustained-yield basis) represents a continuing congressional effort to protect both the present *and future interests* of Indian tribal communities as beneficiaries of tribal forest

lands. The pervasive and complex federal regulatory role in tribal timber sales, as well as the statutory emphasis on steady and continuous production instead of attempts to sell at the peak of the market, certainly impose financial costs on the Indian beneficiaries. These constraints also provide continuous employment opportunity for both Indians and federal regulators.

IV. *Three Aspects of the Federal-Indian Trust Relationship With Respect To Timber.*

A. Federal Liability for Breaches of Trust.

The statement in 25 U.S.C. § 3120 that nothing in NIFRMA "shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom," poses an interesting question of statutory interpretation. Clearly, NIFRMA provides a level of detail concerning forest land management activities that was not previously found in statutes or in 25 C.F.R. Part 163. Surely Congress cannot have intended these directives to be merely precatory.[87] However, when statutes impose duties on the United States with respect to tribal timber they define the contours of the United States' fiduciary responsibilities, and breach of such duties creates liability for breach of trust. Thus, until Congress takes the much-needed step of repealing 25 U.S.C. § 3120 it will be necessary for practitioners to demonstrate that NIFRMA merely clarifies and codifies trust responsibilities arising from other sources.

It was the House of Representatives that inserted 25 U.S.C. § 3120 during the legislative formulation of NIFRMA. The House Report explains that NIFRMA does merely clarify existing trust responsibilities and thus that 25 U.S.C. § 3120 has little impact:

The Committee substitute incorporates six changes requested by the Administration relating to the trust responsibility of the United States for the management and protection of Indian forest lands. The Administration expressed the concern that certain provisions of the bill expanded the trust responsibility of the United States. *While the Committee did not agree that the bill represented an expansion of that responsibility, the amendments were accepted which either deleted, modified, or added language to make clear that there was no such expansion.* The Committee notes the rather sweeping findings of the Supreme Court in the *Mitchell* case and intends that this legislation will better enable the United States to meet *its existing trust responsibility and to avoid the possibility of further liability for damages for breaches of that trust responsibility.* The Committee also wishes to make clear that acceptance of these changes is not to be construed as a congressional diminution of that responsibility.[88]

As suggested by both congressional reports, the seminal opinion on the United States' liability in money damages for breaches of its trust obligations to Indians comes from the Indian timber context. In *United States v. Mitchell ("Mitchell I"),*[89] the Supreme Court rejected on jurisdictional grounds claims brought by the Quinault Nation and Quinault allottees based on government (1) failure to obtain fair market value for timber; (2) failure to manage on a sustained-yield basis; (3) failure to develop proper roads and easements for timber operations; and other claims. The Court of Claims below based its jurisdiction on language in the General Allotment Act which declares the trust character of the allotments. In *Mitchell I,* the Supreme Court pointed out that the General Allotment Act imposes no duty upon the government to

manage timber resources. *Mitchell I* also contains language that many practitioners understood as erecting an insurmountable obstacle to Indian breach of trust litigation.

In *United States v. Mitchell ("Mitchell II"),*[90] however, the Court ruled that the statutes and regulations governing timber management do "establish the 'comprehensive' responsibilities of the federal government in managing the harvesting of Indian timber."[91] Relying on *White Mountain Apache Tribe v. Bracker,*[92] the Court held:

The Department of the Interior -- through the Bureau of Indian Affairs -- "exercises literally daily supervision over the harvesting and management of tribal timber." Virtually every stage of the process is under federal control. . . .

[T]he statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. *They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.*[93]

While *Mitchell II* rehabilitated breach of trust theories long espoused by Indian tribes,[94] and made clear the Claims Court's jurisdiction over such suits, Indian breach of trust litigation in the succeeding eight years has met with very limited success.[95] In general, given the U.S. Justice Department's virtually unlimited ability to prolong breach of trust litigation, tribes must be wary of relying on the expectation of monetary recovery even in the case of plain breaches of statutory and regulatory duties of the Bureau of Indian Affairs. For this reason, the level of detail provided by NIFRMA concerning the United States' management obligations for Indian timber should be very helpful. After all, the tribes' goal is to obtain state of the art management of their forest; they cannot make plans based on the expectation of recovering damages years after the fact of mismanagement.

The Indian Self-Determination and Education Assistance Act, as amended,[96] provides a particularly unsettled context for application of the federal government's trust responsibility. All grants and contracts under this Act, popularly known as Pub. L. 93-638, are subject to the savings provisions found in 25 U.S.C. § 450(n), which declares that "nothing in this Act shall be construed as . . . authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." Nevertheless, contracts entered into under Pub. L. 93-638 generally provide for Indian tribes and organizations to take over and themselves perform services that would otherwise be performed by the United States. NIFRMA specifically encourages use of Public Law 93-638 contracts for management activities on Indian forest lands.[97] To some extent, this assumption of duties may be seen as defeating the comprehensive, day-to-day control of tribal assets and management of timber resources, one of the bases of the Court's finding of trust duties in *Mitchell II*. But tribal resource management cannot weaken the strongest basis for enforcing trust responsibility -- explicit statutory and regulatory duties placed on the United States.

The Act of November 1, 1988,[98] amended the Indian Self-Determination Act to provide, among other things, an experimental self-governance program under which participating tribes can plan, conduct, consolidate and administer federal programs and services. The authorizing

statute for the Self-Governance project[99] reiterates that the agreements to be entered into "shall not allow the Secretary to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive orders, and Acts of Congress."[100] In the annual negotiations concerning "638 contracts" and Self-Governance compacts, the Bureau of Indian Affairs routinely retains appropriated funds necessary to audit the performance of trust functions by tribes. Nevertheless, in practice, it is very unclear whether the Bureau of Indian Affairs' audits are conducted on a sufficiently timely and sophisticated basis to prevent acts and omissions which as a factual matter violate statutory and regulatory duties imposed on the United States with respect to Indian resources. Self-governance compacts also provide that forestry resource management functions retained by the BIA will be audited. Generally, forest management activities are divided between a tribe and the BIA under these compacts and accounting responsibility for wood volumes removed and sales proceeds remains with the United States. Here again, the level of detail specified in NIFRMA concerning necessary forest management activities should help the tribes and the BIA to work together and avoid damages resulting from breaches of trust

B. Production and Sale of Indian Forest Products Is Exempt From State Taxation.

Indian ownership and activities on reservation have long been recognized as exempt from state taxation. One of the broadest applications of this tax exemption is found in the production and sale of tribal timber products.

In *The Kansas Indians*,[101] the Court rejected Kansas' effort to tax tribal and individual lands of the Shawnees that were set aside in Kansas pursuant to a series of treaties by which the Shawnees moved from Ohio to Kansas. Placing a broad reading on protective provisions of the treaties, the Supreme Court held that since the tribal organization of the Shawnees was preserved intact and recognized by the executive branch "they enjoy the privilege of total immunity from state taxation" of property.[102]

With the notable exception of *County of Yakima*,[103] the focus of more recent cases has turned away from attempts directly to tax Indians; instead, the cases examine indirect effects on Indian enterprises arising from state taxation of suppliers to Indians, contractors working for Indians, and purchasers from Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[104] the Supreme Court rejected tribal efforts to sell cigarettes to non-Indians free of state taxes. The Court said: "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest."[105] Thus, applying the "particularized examination" of relevant state, federal and tribal interests, a test articulated in later cases, the Court explained:

Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes

from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservation.[106]

Thus while *Washington v. Confederated Tribes* rejected an effort to shield from taxation reservation commerce that would not have existed without the tax immunity, it seemed to promise such protection where (1) the revenues are derived from revenue generated on the reservation; (2) the activities involve tribes; and (3) the non-Indians are the recipients of tribal services.

Barely two weeks later, the Court decided *White Mountain Apache Tribe v. Bracker*,[107] rejecting a gross receipts tax and fuel tax on two non-Indian corporations engaged solely in felling trees and hauling logs to a tribal saw mill on the reservation. The Fort Apache Timber Company manages, harvests, processes and sells tribal timber, under the "comprehensive" federal timber regulations. FATCO contracted with six non-Indian logging companies as the most economical way to fell, buck and haul logs to the tribal saw mill. Arizona sought to impose a motor carrier license tax of 2.5% of the non-Indian logging company's gross receipts, plus an excise or use fuel tax of $.08 per gallon of fuel. By agreement, the tribe reimbursed the non-Indian loggers for the taxes imposed by the state. The Supreme Court focused on Arizona's ability to tax with respect to activities on BIA-maintained roads because the state conceded it could not tax with respect to activities on tribal roads, and the logging companies conceded that the state could tax with respect to their (minimal) activities on state highways on the reservation. Thus, applying the "particularized inquiry into the nature of the state, federal and tribal interests at stake,"[108] the Court pointed out that the state had no responsibility for and performed no services with respect to the roads at issue, that the taxes would interfere with the objective of the timber regulations and with the flexibility of the Secretary of the Interior with respect to harvest and sale of tribal timber, and finally that the economic burden of the taxes would fall on the tribe.

In 1989, when the Supreme Court reached a seemingly contrary conclusion with respect to oil and gas severance taxes in *Cotton Petroleum Corp. v. New Mexico*,[109] the Court emphasized that *Bracker* involved no state regulatory functions or services with respect to the roads at issue, a tax that fell on the tribe, and interference with a regulatory policy covering the most minute details of the tribe's timber operations. Since only the third of those features was present in *Cotton Petroleum*, and because the federal preemption argument was not fully developed below, the Court upheld the tax there at issue.

Although *Cotton Petroleum* declined to apply to oil and gas operations the protections accorded tribal timber production and sale, its explanation of *White Mountain Apache Tribe v. Bracker* has broadened the tax immunities of tribal timber operations. Barely ninety days after announcement of *Cotton Petroleum*, the Ninth Circuit Court of Appeals extended tribal tax immunities in *Hoopa Valley Tribe v. Nevins*.[110] *Nevins* involved tribal timber, non-Indian mills operating off-reservation, and the California timber yield tax. Some of the private companies purchased tribal timber directly from the BIA and conducted their own logging and hauling operations. Others purchased from the Hoopa Valley Tribal Timber Enterprise, which logged, manufactured and hauled logs to the off-reservation mills. The California timber yield tax is a successor to the state's *ad valorem* property tax. The yield tax is imposed on the value of timber at the time of harvest on the first nonexempt person to acquire title to the timber. By standard

industry practice, the timber owner bears the economic burden of timber taxes imposed on a purchaser.

In *Nevins*, the court of appeals conducted the standard particularized examination of the relevant state, federal and tribal interests and held California's taxes preempted by federal law. The comprehensive regulation of tribal timber considered in *Bracker* was also present in *Nevins*. The court noted that *Nevins* involved goods produced on the reservation and dismissed as a "distinction without a difference" the fact that the tax fell on ownership of cut timber once title transferred to a non-Indian off-reservation.(111) The court found that unlike the situation in *Cotton Petroleum*, in *Nevins* the state had no regulatory interest whatsoever in the management or harvesting of Indian trust timber and there was no direct connection between revenues from the timber yield tax and services connected with the timber activities directly affected. The incidence of the tax was on the tribe.

Hoopa Valley Tribe v. Nevins thus reaffirms the very broad immunity from state taxation for operations connected with the production and sale of tribal timber resources. Courts analyzing a challenged tax will engage in a "particularized inquiry," examine the economic impact, look at the comprehensiveness of federal regulations and scrutinize the nexus between the state taxes and the state's services to the activities to be burdened by the tax. *Nevins* also indicates that the protection accorded value generated on the reservation does not stop at the reservation boundary but encompasses non-Indian activities in commercial centers outside the reservation.(112)

This illustrates the fact that the importance of tribal timber to tribal economic development is recognized in federal laws and policies of more far reaching scope than general laws and policies which immunize many other Indian activities on reservations from state jurisdiction. NIFRMA increases the "comprehensiveness" of federal law with respect to Indian timber. It should, therefore, have the effect of increasing the scope of federal preemption of state and local tax laws with respect to timber related activities.

C. Federal Contracting Law Supersedes State Commercial Law With Respect to Indian Timber.

The sale of Indian tribal timber is accomplished by federally approved contracts which are closely regulated by the Bureau of Indian Affairs. Thus, purchase and sale of Indian timber is best understood as a subset of the law on contracting with the federal government. Like government contracts generally, Indian timber sale contracts occasionally produce results quite different from contracts governed by the Uniform Commercial Code.

A section of the General Forest Regulations, 25 C.F.R. § 163.12, provides with certain exceptions:

[T]he contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. Essential departures from the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary.

The contract forms approved by the Secretary of the Interior have evolved over the years but now typically include three documents: Part A, the timber contract for the sale of estimated volumes; Part B, the timber sale contract standard provisions, and the timber sale contract special provisions. The basic printed forms for Parts A and B were revised in 1976. Part A describes the logging unit, the statutory authority, the parties, the contract dates, the estimated volumes, the payment terms, the stumpage rate and bonding requirements. These terms are elaborated in the Part B standard provisions and in the special provisions which cover general conditions, payments and deposits, cutting schedule, scaling, logging requirements, slash, transportation, fire prevention and other matters. Three cases illustrate unique aspects of these contracts.

In re Humboldt Fir, Inc.[(113)] concerned a claim by the United States as creditor, on behalf of the Hoopa Valley Tribe, against a bankrupt logging company. After Humboldt had failed to log the sale area during the time allowed, plus two extensions of time, the tribe rejected a request for a further extension and resold the timber to another bidder. Humboldt argued that the federal/tribal claim for the difference between the price included in the timber sale contract and the price obtained on resale should be disallowed because the tribe wrongfully refused to grant a third extension and failed to give reasonable notice of its intent to resell the timber under the Uniform Commercial Code. Although the court agreed that the Uniform Commercial Code is a recognized source of general contract law, it concluded that the case was governed by the tribal timber statute, 25 U.S.C. § 407, and the applicable regulations. As to the first issue, the court concluded that Humboldt's inaction provided a reasonable basis for the tribe to conclude that Humboldt had repudiated the contract. The court notes:

Articles 2(i) and 2(j) of the standard timber contract provide that disputes and complaints of any action or decision on the contract may be submitted to the Area Director for resolution and those decisions may be appealed. Humboldt never resorted to this remedy.[(114)]

As to the second claim, Humboldt contended that when the tribe barred Humboldt from bidding on the resale the tribe was, in effect, refusing to give notice of the resale in accordance with the Uniform Commercial Code. The court likewise rejected that claim for failure to pursue available administrative remedies under the timber sale contract. *Humboldt Fir*, therefore, stands for the proposition that a party purchasing tribal timber under the BIA's standard timber sale contract must comply with the dispute resolution procedures of the contract and the regulation and cannot rely upon other remedies available under the Uniform Commercial Code.

Kombol v. Acting Assistant Portland Director (Economic Development)[(115)] clarified which federal laws regulate tribal timber sale contracts and also recognized some limitations on the BIA's appeal process. In *Kombol*, the BIA awarded a sale of timber blown down during a 1979 storm on the Makah Indian Reservation to a non-Indian logging company. Kombol signed the timber sale contract but failed to make the required prepayment and did not begin operations because of downturn in the market. Kombol's requests for an extension of time were denied and eventually were treated as anticipatory breach of the contract by the BIA, which resold the timber. Kombol appealed, arguing that he had not yet breached the contract and that the BIA had wrongfully denied an extension of time. However, the Commissioner of Indian Affairs imposed a cash appeal bond requirement of $130,000 and dismissed the appeal when Kombol failed to comply.

When the United States sued to obtain judgment against Kombol, the federal district court held that the appeal bond requirement had deprived appellant of his right to appeal the question of breach of contract. The appeal bond was not based upon the loss that would be suffered by the BIA and the tribe pending appeal. Accordingly, although parties to a tribal timber sale contract are governed by the BIA's administrative appeal mechanism, that procedure cannot be applied in a way that deprives parties of due process of law.

On remand to the Interior Board of Indian Appeal, Kombol argued that the timber sale contract was void because it failed to comply with the requirements of 25 U.S.C. § 81 which applies to contracts "made by any person with any tribe of Indians." The IBIA's rejection of Kombol's section 81 argument provides a useful clarification for sellers and purchasers of tribal timber because of the unsettled nature of the law and administrative practice under 25 U.S.C. § 81.(116)

The IBIA ruled that the sale of Indian tribal timber is authorized by 25 U.S.C. § 407 and the regulations found in 25 C.F.R. Part 163, neither of which incorporate 25 U.S.C. § 81. Section 81 codifies enactments made in 1871 and 1872, a time when tribes lacked the authority to sell timber by any means except a federal statute or treaty complying with the Non-Intercourse Act.(117) Since there were no tribal timber sale contracts at the time of enactment of 25 U.S.C. § 81, that section could hardly have been intended to govern such contracts. Furthermore, the IBIA pointed out, the courts construing 25 U.S.C. § 407 and the regulations have found in them a comprehensive scheme for the regulation of the sale of Indian timber, and have never required that 25 U.S.C. § 81 be read into that scheme. In addition, the IBIA rejected Kombol's attempt to hide behind § 81, holding that that section is intended for the protection of Indians and not for the economic protection of persons contracting with an Indian tribe.(118)

Hoopa Valley Tribe v. Blue Lake Forest Products(119) involves another conflict between the comprehensive federal statutory and regulatory scheme for the sale of Indian timber and provisions of state law embodied in the Uniform Commercial Code. In *Blue Lake*, the Hoopa Valley Development Enterprise contracted to sell logs to an off-reservation non-Indian lumber mill, subject, among other things, to section B2.1 of the Timber Sale Contract Part B Standard Provisions. This section provides: "Title to the timber covered by the contract shall not pass to the purchaser until it has been scaled, paid for, and removed from the contract area." Blue Lake persuaded the Indian loggers to deliver to its mill logs which had not been "paid for" and thus to which title remained in the United States on behalf of the tribe. Blue Lake then petitioned for bankruptcy, processed the logs, and delivered the proceeds to its secured creditor, Hongkong and Shanghai Banking Corporation, Limited. The tribe sued Blue Lake and the bank, and the district court ordered the matter removed from the bankruptcy proceeding.

In the district court, the tribe argues that the federal statutes and regulations require use of the contract provision on passage of title, and, pursuant to these provisions, title to the Indian timber remains in the United States in trust until, among other things, the "stumpage" has been paid. Accordingly, Blue Lake acquired no title to the logs that were improperly delivered to it. However, Hongkong Bank replies that under Uniform Commercial Code § 2-401(1), a seller's reservation of title is limited in effect to the reservation of a security interest, which is governed by Article 9. The bank argues that because of UCC § 2-403, delivery of the logs to Blue Lake

gave Blue Lake the right to transfer good title to a good faith purchaser for value, and this protects a lender with a perfected security interest. The bank further argues that the Uniform Commercial Code requires the tribe to perfect a purchase money security interest pursuant to § 9-312 in the logs delivered to Blue Lake regardless of whether they were tribal trust property. The tribe replies that the comprehensive federal statutory scheme for sale of tribal timber, not state law, governs the alienation and encumbrance of real or personal property held in trust for an Indian tribe. While the district court has not yet ruled, under the federal preemption principles applied to Indian timber in *White Mountain Apache Tribe v. Bracker*,[120] and *Hoopa Valley Tribe v. Nevins*,[121] it should be clear that the method prescribed by federal law for protecting the rights of tribal timber sellers cannot be weakened by state commercial provisions.

While NIFRMA does not directly address conflicts between federal and state contracts law with respect to tribal timber, it does further reinforce the federal nature of Indian timber sale contracts. Supervision of timber sale contracts and forest product marketing assistance are within the definition of "forest land management activities."[122] In addition, an evaluation of timber sales administration including "accountability for proceeds," is within the assessment which the Interior Department should now have under way.[123]

In conclusion, federal law has evolved from a near-total prohibition on sale of Indian tribal timber into statutes granting broad regulatory authority to harvest tribal timber. Tribal timber must generally be harvested on a sustained-yield basis. This requirement represents a continuing congressional policy judgment that future Indian tribal communities must also have the benefits of tribal forest lands. NIFRMA is a statute of limited, albeit very important, objectives. The success of NIFRMA will substantially depend upon the ability of Congress to make the appropriations called for in the congressional reports. Both Indian and non-Indian developers of tribal timber must view NIFRMA in its legal context, for what NIFRMA does not do is as important as what it does.

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1. 104 Stat. 4531, 25 U.S.C. §§ 3101, *et seq.* (Supp. 1991).
2. 25 U.S.C. § 3101.
3. 25 U.S.C. § 3102.
4. 25 U.S.C. § 3103.
5. 25 U.S.C. § 3104.
6. 25 U.S.C. § 3105.
7. 25 U.S.C. § 3106.
8. 25 U.S.C. § 3107.
9. 25 U.S.C. § 3108.
10. 25 U.S.C. § 3109.
11. 25 U.S.C. § 3110.
12. 25 U.S.C. § 3111.
13. 25 U.S.C. § 3112.
14. Inclusion of ANCSA lands in NIFRMA was controversial. The reference to "local processing and other

value-added activities" emerged in lieu of proposed language that would have restricted exporting of products of such lands. Thus ANCSA lands, like other tribal and individual Indian lands that are held in trust or subject to alienation restriction, remain free of timber export and substitution prohibitions. *See* 16 U.S.C. § 620e (excluding such lands from the definitions of both "federal lands" and "private lands" for purposes of the Forest Resources Conservation and Shortage Relief Act of 1990, Pub. L. 101-382, 104 Stat. 723).

15. 25 U.S.C. § 3113.
16. 25 U.S.C. § 3114.
17. 25 U.S.C. § 3115.
18. 25 U.S.C. § 3116.
19. 25 U.S.C. § 3117.
20. 25 U.S.C. § 3118.
21. 25 U.S.C. § 3119.
22. 25 U.S.C. § 3120.
23. (codified at 25 U.S.C. § 413).
24. Wayne C. Nordwall, in the Phoenix Field Office of the Solicitor, Department of the Interior, signed the opinion on January 12, 1990.
25.25 U.S.C. § 3111(a)(2)(D).
26. 25 U.S.C. § 3102.
27. 25 U.S.C. § 3103(11).
28. *The National Indian Forest Resources Act*, S. Rep. No. 101-402 at 9, 101st Cong., 2d Sess. (1990) (hereinafter "Senate Report").
29. *Id.* at 9.
30. 86 U.S. (19 Wall.) 591 (1873).
31. 21 U.S. (8 Wheat.) 543 (1823).
32. 30 U.S. (5 Pet.) 1 (1831).
33. *Cook*, 86 U.S. (19 Wall.) at 593.
34. (codified at 25 U.S.C. § 177).
35. Ch. 41, § 1, 22 Stat. 590 (codified as amended at 25 U.S.C. § 155).
36. 19 Op. Atty. Gen. 232 (1889).
37. 30 Stat. 90 (codified at 25 U.S.C. § 197).
38. 25 Stat. 673 (codified at 25 U.S.C. § 196), states: "The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of

the dead timber standing, or fallen, on such reservation or allotment for the sole benefit of such Indian or

Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled,

or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall

not be granted."

39. *See* Pine River Logging & Improvement Co. v. United States, 186 U.S. 279, 285 (1902).

40. 186 U.S. 279 (1902).

41. *Id.* at 280.

42. *Id.* at 291.

43. Pine River Logging & Improvement Co. v. United States, 186 U.S. 279, 290-92 (1902) (emphasis

added).

44. (now codified at 25 U.S.C. § 81).

45. 233 U.S. 558 (1914).

46. 35 Stat. 855 (codified at 25 U.S.C. §§ 406, 407).

47. In United States v. Mitchell ("*Mitchell II*"), 463 U.S. 206, 219 (1983), the Supreme Court traces the Secretary of the Interior's "pervasive role in the sales of timber from Indian lands" to passage of the Act of June 25, 1910.

48. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 1911).

49. *Mitchell II*, 463 U.S. at 220.

50. 264 U.S. 446 (1924).

51. 48 Stat. 986 (codified in scattered sections of Title 25, U.S.C.).

52. (codified at 25 U.S.C. § 466) (emphasis added).

53. 78 Cong. Rec. 11730 (1934).

54. *Hearings on H. R. 7902 before the H. Comm. on Indian Affairs*, 73d Cong., 2d Sess. Part 1 at 35 (1934).

55. *See* 25 U.S.C. § 476.

56. *E.g.*, United States v. Harris, 100 F.2d 268 (9th Cir. 1938); Polley's Lumber Company v. United States,

115 F.2d 751 (9th Cir. 1940); United States v. Deschutes Pine Timber Company, 35 F. Supp. 72 (W.D.

Wash. 1940).

57. 305 U.S. 415 (1939).

58. *Algoma Lumber Co.*, 305 U.S. at 421.

59. *See* Forest Lumber Co. v. United States, 135 Ct. Cl. 488, 141 F. Supp. 953 (Ct. Cl. 1956);

Birkelund v. United States, 135 Ct. Cl. 503, 142 F. Supp. 459 (Ct. Cl. 1956).

60. 118 F.2d 421 (9th Cir. 1941), *cert. denied*, 314 U.S. 635 (1942).

61. *Eastman*, 118 F.2d at 424-25. *See also Starr v. Campbell*, 208 U.S. 527 (1908) (upholding

Secretary's power to amend regulation and reduce payments to Indian treaty allottee even after timber sale

contract had been executed).
62. Pub. L. 88-301, 78 Stat. 186.
63. (codified at 25 U.S.C. § 407) (emphasis added).
64. H. Rep. No. 1292, 88th Cong., 1st Sess. (1963).
65. 25 C.F.R. § 163.4.
66. 86 U.S. (19 Wall.) 591 (1873).
67. __ U.S. __, 111 S. Ct. 905 (1991).
68. 437 U.S. 634 (1978).
69. 111 S. Ct. at 910 (citations omitted).
70. *See* 25 U.S.C. § 3103(12).
71. The NIFRMA definition of "Indian land" encompasses off-reservation nontrust tribal lands "subject to a restriction by the United States against alienation." 25 U.S.C. § 3103(10)(B). Because "forest land management activities" to be undertaken by the Secretary include "advertising, executing and supervising" timber sales contracts, 25 U.S.C. § 3103(4)(G)(iv), it appears that NIFRMA grants timber sales authority and responsibility with respect to such tribal off-reservation nontrust restricted land not previously found in 25 U.S.C. § 407. See text accompanying n. 84, i*nfra.*
72. 348 U.S. 272 (1955).
73. 304 U.S. 111 (1938).
74. United States v. Shoshone Tribe of Indians, 304 U.S. at 118.
75. 304 U.S. 119 (1938).
76. 305 U.S. 415 (1939).
77. United States v. Algoma Lumber Co., 305 U.S. at 420. *Compare* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 146 n.12 (1980) *with id.* at 139 n.1 (discussing *Cook, Pine River Logging, Shoshone, Algoma Lumber Co.*, and the statute establishing the Fort Apache Reservation).
78. In addition, even in clear cases of Fifth Amendment-protected rights, a tribe's beneficial ownership of timber sale proceeds does not prevent Congress from imposing administrative fees on tribal timber management and harvest. *See* 25 U.S.C. § 413; Quinault Allottee Ass'n v. United States, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974) (General Allotment Act does not prohibit reasonable administrative charges against the proceeds from allotted Indian land held in trust); United States v. Eastman, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941) (Quinault treaty did not immunize

allottee timber sale proceeds from charges); Choctaw Nation v. United States, 91 Ct. Cl. 320 (1941)
(government's administration of tribal affairs did not impose upon the government the obligation of paying all
expenses).
79. *Hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, on H.R. 6287, H.R. 4394 and S. 1565*, 88th Cong., 2d Sess. (unpublished 1964).
80. S. Rep. No. 672, 88th Cong., 1st Sess. (November 22, 1963).
81. *E.g.*, United States v. Jim, 409 U.S. 80, 82-83 (1972); Gritts v. Fisher, 224 U.S. 640, 642 (1912);
Felix S. Cohen's Handbook of Federal Indian Law 605-06 (R. Strickland ed. 1982).
82. 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).
83. *Short III*, 719 F.2d at 1136.
84. *Id.*
85. Pub. L. 100-580, 102 Stat. 2924, 2936.
86. S. Rep. No. 100-564, 100th Cong., 2d Sess. at 30 (1988).
87. *Cf.* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) ("Bill of Rights" provision of
Developmentally Disabled Assistance and Bill of Rights Act essentially precatory and therefore unenforceable
under 42 U.S.C. § 1983).
88. *Improving the Management of Forests and Woodlands and the Production of Forest Resources
on Indian Lands, and for Other Purposes*, H.R. Rep. No. 101-835, 101st Cong., 2d Sess. at 15 (1990)
(hereinafter "House Report").
89. 445 U.S. 535 (1980).
90. 463 U.S. 206 (1983).
91. *Id.* at 222.
92. 448 U.S. at 145.
93. *Mitchell II*, 463 U.S. at 222, 224 (emphasis added; footnotes and citations omitted). Ultimately, in
1989, the Claims Court entered a stipulated judgment of $26.6 million for the breaches of trust in that case.
94. *E.g.*, Chippewa Indians v. United States, 91 Ct. Cl. 97 (1940) (awarding damages for negligence of
government officer in surveying and preparing timber sale yield estimate); Menominee Tribe v. United States,
59 F. Supp. 137 (Ct. Cl. 1945) (finding breach of trust where government removed timber trust funds from
an account and replaced them with funds bearing interest at a lower rate); Menominee Tribe v. United States,

91 F. Supp. 917 (Ct. Cl. 1950) (finding violation of timber harvest statute where green timber not designated
for cutting was removed).
95. *Compare, e.g.*, Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393, 1400 (8th Cir. 1987),
modified on other grounds, 846 F.2d 474 (1988) (government cannot allow funds in Treasury to remain
unproductive without breaching its duty to manage revenue from forestry projects prudently) *with* White
Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987) (finding limited government liability for
mismanagement of timber stands, and directing further proceedings); Navajo Tribe of Indians v. United
States, 9 Cl. Ct. 336 (1986) (awarding recovery for failure to cut, unpaid stumpage, logging waste, saw mill
mismanagement and unaccounted-for sales, but not on lack of regeneration) *and* Begay v. United States, 16
Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1989) (concluding Relocation Act statement of maximum
benefits prevented government liability for breach of trust in failing to achieve purposes of the Act). *See also*
Menominee Tribe of Indians v. United States, 726 F.2d 718 (Fed. Cir. 1984) (statute of limitation barred
timber mismanagement claim).
96. 25 U.S.C. §§ 450, *et seq.*
97. 25 U.S.C. § 3104(a).
98. Pub. L. 100-581, 102 Stat. 2285.
99. Title III of Pub. L. 100-581.
100. Pub. L. 100-581 § 303(a)(7).
101. 72 U.S. (5 Wall.) 737 (1867).
102. *Id.* at 756.
103. County of Yakima v. Confederated Tribes and Bands of the Yakima Nation, Nos. 90-408 and 90-577,
__ U.S. __, 1992 WL 2908 (January 14, 1992), extends the damage to Indian tax immunity caused by
section 6 of the General Allotment Act. Reservation lands which have passed into fee simple title status under
the General Allotment Act are not exempt from *ad valorem* property taxes but retain exemption from
transfer taxes.
104. 447 U.S. 134 (1980).
105. *Id.* at 155.
106. 447 U.S. at 156-57.

107. 448 U.S. 136 (1980).
108. *Id.* at 145.
109. 490 U.S. 163 (1989).
110. 881 F.2d 657 (9th Cir. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 1523 (1990).
111. *See* 881 F.2d at 660 n.2.
112. *Compare* Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997
(1988) (coal severance tax adversely affecting tribal resource development activity invalid although imposed
on non-Indian lessee off-reservation) *with* Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160
(1980) (tax on nonIndian seller of tractors was preempted by Indian trader statutes where contract, payment
and delivery of tractors took place on reservation).
113. 426 F. Supp. 292 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980).
114. 426 F. Supp. at 298 n.7.
115. 19 I.B.I.A. 123 (1990).
116. *See, e.g.*, A. K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir.
1986) (agreement between tribe and contractor for construction and operation of a bingo facility was void
without IA approval not withstanding the existence of BIA correspondence concerning other bingo
agreements indicating that 25 U.S.C. § 81 approval was unnecessary).
117. 25 U.S.C. § 177.
118. *Kombol*, 19 I.B.I.A. at 129-31. After further proceedings in Kombol v. Assistant Portland Area
Director, 21 I.B.I.A. 116 (1991) ("*Kombol II*"), the Board upheld the BIA's measure of damages for
anticipatory breach and rejected the argument that the doctrines of mitigation of damages and avoidable
consequences create enforceable rights in the breaching party or require the BIA to obtain the consent of the
party that breached the original contract before approving modifications to the resale contract which had the
effect of increasing the liability of the breaching party.
119. No. C 91 1911 SBA (N.D. Cal. 1991).
120. 448 U.S. 136 (1980).
121. 881 F.2d 657 (9th Cir. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 1523 (1990).
122. 25 U.S.C. § 3103(4)(G).
123. 25 U.S.C. § 3111(a)(2)(D).