Indians and Federal Income Tax

Patrick Putzi
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Indian land falls into two broad categories: allotted, which is individually owned, and tribal, which is communally owned. Both classes are exempt from real property taxation; but individual income receives markedly different tax treatment depending upon which class it is derived from. Under present-day law, the individual Indian’s income from farming, raising livestock, or making other use of allotted land is exempt from federal taxation; but that derived from use of tribal land is not. The anomaly arose as a by-product of the federal policy, long since abandoned, of breaking down the tribes and encouraging Indian individualism for the purpose of assimilation, seen in those days as the goal of United States Indian administration.

Current federal policy is to stimulate and encourage tribal self-determination and community economic development. The income tax law as now applied works at cross-purposes to such a policy.

This article argues that established principles of Indian law justify judicial enlargement of the income tax exemption, and that the strong policy considerations urging executive and legislative action to the same end do not represent a sharp break with precedent.

HISTORICAL BACKGROUND

For almost a century after the Revolutionary War, the Indian tribes were recognized by the United States as political sovereignties holding a usufruct or possessory interest in the lands which they inhabited.1 As a consequence, land cessions were obtained from Indian tribes by means of formal treaties for monetary consideration until 1871. In that year the House of Representatives forced the Senate to accept an amendment to an Indian appropriations act declaring that thereafter no Indian tribe would “be acknowledged... as an independent... power with whom the United States may contract by treaty....”2

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1. Judicial approval of federal Indian policy was expressed early by the Supreme Court. Chief Justice Marshall held that Congress possessed the sole power to acquire Indian lands through purchase or conquest according to the “pre-emption” doctrine in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), and in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), Marshall asserted the doctrine of tribal sovereignty.

   That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.
To assure the orderly acquisition by whites of Indian lands, the tribes were prohibited by § 8 of the Indian Intercourse Act of March 1, 1793, from making land cessions except to the United States. Similar language was carried forward into all the subsequent Indian Intercourse Acts, becoming a permanent principle of federal law in § 12 of the Act of June 30, 1834. The typical Indian treaty extinguished the tribal possessory land interest and reserved a smaller tract for the Indians either in their original region or in another part of the country.

As the population of the United States increased, the demand for cheap public land for settlement increased. After termination of Indian treaty making, further cessions of tribal lands were obtained through agreements subject to ratification by both Houses of Congress. In addition, the General Allotment Act of 1887 was enacted. It provided that each member of an Indian tribe should receive 80 acres of farming land or 160 acres of grazing land in severalty to be held in trust by the United States inalienable and

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4. Purchases of Grants of Land From Indians, 25 U.S.C. § 177 (1963) reads: No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.
5. Reserving aboriginal lands for Indian use, no doubt gave rise to the term "Indian reservation." In Minnesota v. Hitchcock, 185 U.S. 373, 387-390 (1901), the Court pointed out that no specific language is required to create an Indian reservation, commenting that: In order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Once recognized by treaty or statute, Indian tribal property rights are protected by the Fifth Amendment. Shoshone Tribe v. United States, 299 U.S. 476 (1937). But lands set aside for Indian use by a treaty of amity, Northwestern Shoshone Indians v. United States, 324 U.S. 335 (1945), or by Executive order, Sioux Tribe v. United States, 316 U.S. 317 (1942), are not constitutionally protected.
6. Agreements for the allotment of tribal lands became federal law through enactment by Congress, but the terms of these agreements were frequently amended. The Jerome Agreement of October 6, 1892, was enacted by § 6 of the Act of June 6, 1960, ch. 813, Art. I, 31 Stat. 676. But Congress amended the Jerome Agreement unilaterally to provide that 480,000 acres of tribal lands be reserved for communal grazing. See Kiowa, Comanche and Apache Tribes of Indians v. United States, 22 Ind. Cl. Comm. 482, 484 (1970).
untaxable for a period of 25 years, or longer, if extended by the President.\textsuperscript{9} Tribal lands not needed for allotment were to be sold to the United States and made available for white settlement under the existing homestead laws.\textsuperscript{10} Several special allotment acts of similar import but applicable only to named tribes were also enacted.\textsuperscript{11}

Prior to the Allotment Act, the Indians owned approximately 140 million acres of land; by 1934 the total had dwindled to 48 million acres.\textsuperscript{12} To stop these losses of land and encourage the reorganization of tribal governments, Congress passed the Indian Reorganization Act (I.R.A.) of June 18, 1934.\textsuperscript{13} On Indian reservations not rejecting the I.R.A.,\textsuperscript{14} the act terminated the allotment policy through two devices, § 1 prohibited further allotment in severity of tribal lands,\textsuperscript{15} and § 2 extended existing trust periods “until otherwise directed by Congress.”\textsuperscript{16}

Following World War II, in an attempt to hasten Indian acculturation, Congress unanimously adopted House Concurrent Resolution 108\textsuperscript{17} establishing a goal of terminating the special legal status of

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    \item \textsuperscript{9} Allotment of Indian Lands, 25 \textsc{U.S.C.} § 348 (1963).
    \item \textsuperscript{10} Act of Feb. 8, 1887, ch. 119, § 5, 24 \textsc{Stat.} 389.
    \item \textsuperscript{11} The provisions of Special Allotment Acts were normally obtained by agreements made by the Indian Tribes and special allotment commissions. \textit{See note 7, supra.}
    \item \textsuperscript{12} \textit{See} statement of John Collier, Commissioner, Bureau of Indian Affairs (B.I.A.), U.S. Dep't of Interior, \textit{Hearings on H.R. 7902 Before House Comm. on Indian Affairs, 73rd Cong., 2nd Sess., part 1, at 30 (1934)} (hereinafter cited as \textit{House Hearings}). \textit{See also, Fey and D'Arcy, Indians and Other Americans—Two Ways of Life Meet, 84-85 (1970).}
    \item \textsuperscript{13} The Wheeler Howard Indian Reorganization Act of 1934 (hereinafter cited as I.R.A.), ch. 576, § 18, 48 \textsc{Stat.} 984.
    \item \textsuperscript{14} I.R.A., 25 \textsc{U.S.C.} § 478 (1963), reads:
        This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.
        After the special elections, 181 tribes accepted the act; 77 rejected it; and 14 Indian tribes came under it because of failure to vote. \textit{See Haas, The Legal Aspects of Indian Affairs from 1887 to 1957, 311 Annals 12, 19 n. 43 (1957).}
    \item \textsuperscript{15} Allotment of Lands on Indian Reservations, 25 \textsc{U.S.C.} § 461 (1963), reads:
        That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severity to any Indian.
    \item \textsuperscript{16} Existing Periods of Trust and Restrictions on Alienation Extended, 25 \textsc{U.S.C.} 462 (1963), reads:
        The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.
        The trust period for land owned by Indians not electing to be governed by the I.R.A. must be periodically extended. \textit{See Appendix to ch., 1, 25 CFR 1972 for citations of Executive order extending the trust and restricted period for Indian allottees not governed by the I.R.A.}
    \item \textsuperscript{17} H. Cong. Res. 108, Aug. 1, 1953, 67 \textsc{Stat.} B 132.
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Indians on a tribe-by-tribe basis. Under the new policy, Congress terminated federal service for several Indian tribes, subjecting individual members to state law and tribal lands to full taxation. During the termination period, it has been estimated that Indians lost another two million acres of land.

Since 1960, federal policy has attempted to stimulate economic development of reservation assets. In 1970, President Nixon called for a new era of Indian self-determination which will permit the Indians to formulate the policies governing their welfare.

DECLINE OF THE TAX IMMUNITY DOCTRINE

After adoption of the 16th Amendment and the enactment of a comprehensive federal income tax law, a difference of opinion respecting the liability of Indians developed. The Treasury believed that the broad language of the new law subjected Indians to federal taxation. But the Justice Department maintained that Indian income was not taxable both because general laws did not ordinarily apply to Indians and because specific exemptions from taxation existed in laws allotting Indian tribal lands in severalty.

In support of its view, Treasury relied upon the Supreme Court's decision in The Cherokee Tobacco. In that case an 1868 federal excise tax, imposed upon the production of tobacco and liquor manufactured "anywhere within the exterior boundaries of the United States . . . [whether] within a collection district or not . . . ," was assessed and levied against the tobacco products of Cherokee Indians, residing in the Indian Territory (now a part of the State of Oklahoma). Article 10 of the Cherokee Treaty of July 10, 1866, had granted "every Cherokee Indian . . . the right to sell mer-

18. See Act of June 17, 1954, ch. 273, § 9, 68 Stat. 252, declaring that the Menominee Indians "shall be subject to the same taxes, State and Federal, as in the case of non-Indians . . . " upon the effective date of federal termination. But, c.f. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), holding that termination did not deprive the tribe of preferential hunting and fishing rights. See also Orfield, A Study of The Termination Policy (1966), for a report on the process followed by the Menominee Tribe in effecting federal termination and a critique on the negative implications of the policy. Act of Aug. 13, 1954, ch. 773, § 9, 68 Stat. 726, states in part that "following distribution of property to the Klamath Indians' such property and any income derived therefrom . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians. . . ."

19. Fey and McNickle, supra note 12, at 204-205.


21. See the 1922 opinion of Carl Mapes, Solicitor of Internal Revenue holding the income of Quapaw Indians liable for federal income taxes. I-1 Cum. Bull. 64 (1922). But see I.T. 1834, II-2 Cum. Bull. 62, 63 (1923), where income from the homestead allotments of Osage Indians were held to be exempt upon the ground that "a tax upon the income would be equivalent to a tax upon the interest itself."


chandise or manufactured products... without paying any tax thereon which is now or may be levied by the United States on the quantity sold outside Indian Territory..." 24 In holding Indian manufacturers subject to taxation, the Supreme Court reasoned that the subsequent general law, by implication, had repealed the specific exemption found in the treaty. 25

In a series of formal opinions, however, the Justice Department built a legal framework which for several years sheltered the Indians from payment of income tax. In a letter dated March 24, 1924, 26 to the Secretary of the Treasury, Attorney General Dougherty pointed out that the special allotment acts granting individual property interests to the members of the Five Civilized Tribes—Cherokee, Choctaw, Chickasaw, Creek and Seminole—created vested property rights in exemptions from taxation. Relying upon the theory advanced by the Supreme Court in Pollock v. Farmers Loan & Trust Co., 27 Dougherty reasoned that income from tax exempt land would also be exempt from all taxation, because the income was a part of the land.

In a letter to the Secretary of the Interior dated March 20, 1925, 28 Attorney General Sargent ruled that income from a Quapaw allotment made pursuant to the General Allotment Act also was not subject to income tax, because general laws of Congress do not apply to Indians. Similar reasoning was used to immunize income obtained from tribal lands on unallotted reservations. In another letter to the Secretary of Interior dated June 24, 1926, Attorney General Sargent wrote:

Unallotted Indians maintaining their tribal connections and residing on reservations of the land set apart by the Federal Government for the tribe of which they are members do not come within the purview of the federal revenue acts, and... therefore, the income of such Indians derived from the increase of sheep and cattle bought for them by the Government, or from business conducted on the reservation by such Indians with other Indian wards of the Govern-

25. The precedential value of The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870), decision was questioned by Justice Field, writing as follows in United States v. Forty Three Gallons of Whiskey, 108 U.S. 491, 497-498 (1883):
The case of the Cherokee Tobacco Tax, 11 Wall. 616, cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four.
ment, or from any other source herein considered, is not subject to federal income tax.29

The contrary view of the Treasury Department was advanced by a 1926 decision of the Board of Tax Appeals30 holding that mineral royalty income of Osage Indians was taxable. In 1906, pursuant to a special act, members of the Osage tribe were granted allotments of surface rights in tribal lands. The minerals were retained in tribal ownership, and each of the 2,229 tribesmen was granted an equal, devisable share in the mineral estate, called a “headright.”'31 The interests in land were made inalienable and non-taxable for a period of years, but the mineral estate was not specifically exempted from taxation. The Tax Board stated:32

Congress has had full knowledge of the questions of policy affecting Indians and that the existence of valuable mineral rights under their land requires consideration. Since The Cherokee Tobacco decision it presumably has been aware that as to internal taxes an express exception is needed, and yet, notwithstanding the numerous exemptions provided by section 231 of the Revenue Act, no such exception is made for the Indian.

Following a period of Congressional silence, the Supreme Court in 1930, in Choteau v. Burnet,33 ruled in favor of taxability of Osage royalty income, stating that the broad statutory language of the Internal Revenue Act evinces a Congressional intent to tax the income of every person unless specifically exempted. But advocates of Indian tax immunity sought to limit the effect of the Choteau ruling, on the ground that the Indian taxpayer possessed a Certificate of Competency, freeing his . . . income from all restrictions. In a companion case, Blackbird v. Commissioner,34 the Tenth Circuit had decided that restricted Osage mineral royalty income was not subject to federal income tax.

The question of whether the federal income tax applied to the income from trust property of Indians lacking a Certificate of Competency was not squarely presented to the Supreme Court until

31. Cf. McCurdy v. United States, 246 U.S. 263 (1918). See Globe Indemnity Co. v. Bruce, 81 F.2d 142, 148-149 (10th Cir. 1935), where an Osage headright was defined as “the right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of bonuses and royalties arising from the mineral estates and the interest on the trust funds. . . .”
34. Blackbird v. Commissioner, 38 F.2d 976 (10th Cir. 1930).
1935. In *Superintendent v. Commissioner*,\(^{35}\) decided that year, a Creek Indian, Sandy Fox, challenged the taxability of his income derived from reinvesting income from his individual allotment. Sandy Fox argued that the decision in *Blackbird* should control. The Supreme Court, however, said that *Blackbird* did not "harmonize with what we said in *Choteau v. Burnet*," and added:\(^{36}\)

> We [cannot] conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Non-taxability and restriction upon alienation are distinct things... The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

After the *Sandy Fox* decision, Attorney General Cummings withdrew the opinion holding that income obtained from land allotted pursuant to the General Allotment Act was exempt from federal taxation.\(^{37}\) Subsequently, the Treasury issued a revenue ruling concluding "that [any] exemption from payment of federal income tax may not be implied and that if exemption of Indians from payment of such tax exists it must derive plainly from the federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs."\(^{38}\)

*Jones v. Taunah*,\(^{39}\) decided in 1951 by the Tenth Circuit, held that the leasehold and mineral royalty income from the restricted allotment of a Comanche Indian was taxable. The Ninth Circuit, in *Squire v. Capoeman*,\(^{40}\) decided in 1955, however, that the proceeds from the sale of timber felled on the restricted allotment of a Quinaelt Indian were not subject to capital gains tax. To resolve the apparent conflict in the decisions of the two circuits, the Supreme Court granted *certiorari*.\(^{41}\)

Mr. Capoeman, the taxpayer, pointed to the language of § 5 of the General Allotment Act which directs the federal government to hold title to his allotment in trust for 25 years and thereafter to grant fee title, "free and clear of all charge or incumbrance whatsoever,"\(^{42}\) and argued that the word "incumbrance" included any

\(^{36}\) Id. at 419-421.
\(^{40}\) *Squire v. Capoeman*, 220 F.2d 349 (9th Cir. 1955), *aff'd*, 351 U.S. 1 (1956).
\(^{41}\) *Squire v. Capoeman*, 351 U.S. 1, 5 (1956).
\(^{42}\) Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389, reads in part: That upon the approval of the allotments provided for in this act... the Secretary of the Interior, shall cause patents to issue... in the name of the
form of taxation. In 1903, Justice Harlan had relied upon § 5 of the Allotment Act to support the conclusion that an *ad valorem* property tax assessment against an Indian allotment was invalid, pointing out that:  

If [these lands] be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated; for by the act of 1887 the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, “and free of all charge or incumbrances whatsoever.” To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.

The government argued that the language of §§ 544 and 645 of the General Allotment Act protected the allottee only from imposition of *ad valorem* property taxes. But Chief Justice Warren rejected this narrow view of the statutory language:  

The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

The Court distinguished the *Choteau* and *Sandy Fox* cases, but carefully added:  

We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made... and that *at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.*... (Emphasis added)

44. See note 42, supra.
45. Patents In Fee to Allottees, 25 U.S.C. § 349 (1963), reads in part:  

That the Secretary of the Interior may, in his discretion, ... at any time ... cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. ... (Emphasis added)
47. Id. at 6.
citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of the respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

The Supreme Court appeared to avoid any necessity for discussing the repudiated doctrine of the *Pollock* case, by finding that a literal reading of the Allotment Act exempted the allottee from all taxes.\textsuperscript{48} Chief Justice Warren concluded by expressing a matter of policy which perhaps shaped the decision more than any particular statutory language:\textsuperscript{49}

The wisdom of the congressional exemption from tax embodied in... the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land.... Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent... To tax respondent under these circumstances would, in the words of the court below, be "at the least, a sorry breach of faith with these Indians."

\textsuperscript{48} The doctrine of the *Pollock* case had been overruled *sub silentio* in New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 314-315 (1936) by Justice Stone as follows:

In *Pollock v. Farmers Loan & Trust Co.*, ... the question for decision was whether a federal tax on income derived from rents of land is a direct tax requiring apportionment under Art. I, § 2, Cl. 3 of the Constitution. In holding that the tax was "direct," the Court did not rest its decision upon the ground that the tax was a tax on the land, or that it was subject to every limitation which the Constitution imposes on property taxes. It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command.

In *Squire v. Capoeman*, 351 U.S. 1 (1956), the government cited the *Cohn* case in its brief, vol. 47 *Records & Briefs Filed in U.S. Sup. Ct. Cases*, Docket 134, October Term, 1955; (Petitioner's Brief, at 25-26), and argued that even if § 5 and 6 of the Allotment Act exempted the land, income therefrom could not be considered a part of the tax exempt land. As authority for extending the tax exemption to income from the allotted land, the Court cited *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), where Justice Stone had held that a state three percent gross royalty tax upon allotments of Choctaw Indians were illegal pointing out that:

whatever was the meaning the present exemption clause at the time of its adoption must be taken to be its effect now, since it may not be narrowed by any subsequently declared intention of Congress. ... Having in mind the obvious purpose of Atoka Agreement to protect the Indians from the burden of taxation... we think the provision... cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership.

\textsuperscript{49} *Squire v. Capoeman*, 351 U.S. 1, 10 (1956).
SCOPE OF THE INCOME TAX EXEMPTION

The Capoeman decision heralded a swing back to greater liberality by the federal courts in allowing Indian tax exemption. The majority of reported decisions since 1955 have held that income from individual interests in land held by Indians is exempt from federal taxation.

A. Income From Allotted Lands

In an attempt to limit the scope of the Capoeman decision, the Revenue Service asserted that the income from land obtained pursuant to special allotment acts would be taxable unless the legislation contained language identical to § 5 of the General Allotment Act. In United States v. Hallam, the government argued that the Quapaw Allotment Act did not exempt income from land allotted thereunder, because the special act merely provided that the "said allotments shall be inalienable for a period of 25 years..." The Tenth Circuit discounted the effect of this language, pointing out, "that § 8 of the General Allotment Act... provided specifically that the Act should not extend to the territory occupied by ten different tribes in the 'Indian Territory'. The Quapaws were not excluded." The Court's conclusion was buttressed by the language of a 1939 statute extending the restrictions upon Quapaw allotments including "all existing restrictions, tax limitations and exemptions."

In Stevens v. Commissioner, the Ninth Circuit interpreted the 1921 Act allotting the Fort Belknap Indian Reservation, which simply directed the Secretary of the Interior to make pro rata allotments and issue "trust patents." The income had been obtained through cattle ranching conducted upon land which had been acquired by the Indian taxpayer partially through an original allotment, partially by gift from his mother, partially by purchase from other original allottees, and partially by purchase from other Indians through the Regional Director of the Bureau of Indian Affairs pur-

50. 304 F.2d 620 (10th Cir. 1962).
52. Act of Mar. 2, 1895, ch. 188, § 1, 28 Stat. 876, 907.
55. Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971).
56. Act of Mar. 3, 1921, ch. 135 41 Stat. 1355, directs the Secretary of the Interior "to allot pro rata, under rules and regulations and in such areas and classes of land as may be described by him, among such enrolled Indians all the unreserved and otherwise undisposed lands of the Fort Belknap Reservation... [and issue] trust patents... in the names of said allottees."
Maintaining that the income from his land was tax exempt, the taxpayer requested the Tax Court to re-determine the alleged tax deficiency. The Tax Court ruled that income from Stevens' original allotment and from lands acquired from other original allottees was exempt from taxation; but Stevens was held to be liable for taxes upon income from land obtained pursuant to § 5 of the I.R.A.

Upon appeal, the government reasserted its claim that all the income was taxable. The taxpayer argued that a 1923 statute extending the provisions of the General Allotment Act to lands "purchased by the authority of Congress for the use or benefit of any individual Indian," included lands acquired by Indians themselves under § 5 of the I.R.A. thereby creating an implied exemption from federal taxation. The Ninth Circuit held that all of the acts creating the Indian severalty interests in land, including the I.R.A. were in pari materia. The result, the Court said, was a uniform system of Indian land ownership, commenting:

A successful program of rebuilding... [the Indian] land base and consolidating individual holdings into economic units requires that the Secretary have a large measure of flexibility in the acquisition of additional lands. One obvious means by which these dual goals could be accomplished was the purchase of lands by Indians from other Indians. This has been recognized by Interior in its administration of the Act.

The Revenue Service now asserts that the Indian tax exemption extends only to income derived directly from individually owned Indian lands. That would include:

... rentals (including crop rentals), royalties, proceeds from the sale

57. Acquisition of Lands, Water Rights or Surface Rights; Appropriation, 25 U.S.C. § 465 (1963), reads in part:

   The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased for the purpose of providing land for Indians. . . Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

58. Allotment of Indian Lands, 25 U.S.C. § 335 (1963), reads:

   That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 . . . (the General Allotment Act) as amended, be, and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

59. Stevens v. Comm'r of Internal Revenue, 452 F.2d 741, 748 (9th Cir. 1971).

of the natural resources of the land, income from the sale of crops grown upon the land and from the use of the land for grazing purposes, and income from the sale or exchange of cattle or other livestock raised on the land. Proceeds from the sale of restricted allotted land while the fee title is still held by the Government in trust for the Indian are also exempt from tax.

The Revenue Service extends the income tax exemption to the proceeds from the sale of cattle raised on allotted lands because "of the difficulties... in allocating the portion [of] livestock sales proceeds attributable to the land and the portion attributable to other factors such as labor [and] the use of equipment..." The Capoeman decision is cited in support of this restrictive ruling. But in that case the Supreme Court used the phrase "income derived directly" from the land, merely to distinguish the income at issue from reinvestment income such as that involved in Sandy Fox.

If the Revenue Service continues to interpret the Capoeman case narrowly, future litigation is probably inevitable, as efforts by the Bureau of Indian Affairs to promote economic development result in more non-agricultural sources of revenue from Indian trust land. It is believed that denials of tax exempt status to other forms of income will result in future reversals by federal courts. In United States v. Daney, the Tenth Circuit held that a Choctaw Indian's oil bonus was not subject to federal income tax despite the fact that a special act subjects "all minerals of members of the Five Civilized Tribes to all federal taxes of every kind and character..." The Tenth Circuit narrowly construed the act and pointed out that "Congress... [accorded] the Indians a different set of tax rules..."

62. In distinguishing the Sandy Fox case, the Court comments 351 U.S. at 9, that "the purpose of the allotment system was to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.'... To this end, it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." (Emphasis added)
63. 370 F.2d 791 (10th Cir. 1966).

That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.
[which must be] preserved to carry out the Congressional purpose
behind the allotment system . . . ."

B. Income From Tribal Lands

Although Indian tribes are not considered taxable entities,66 distributions of money to tribal officers, and the income of an Indian lessee of tribal lands have been held to constitute taxable income. In Commissioner v. Walker,67 the government appealed the decision of the Tax Court holding that payments made to the treasurer of the Gila River Pima-Maricopa Indian Community, Freeman P. Walker, were not taxable income. The Tax Court made extensive findings of fact which indicated that the reservation had been organized under § 16 of the I.R.A. and that the money which the tribe paid to Walker was derived from communal farming on unallotted tribal lands. In support of its conclusion, the Tax Court commented:68

[that] this is not an ordinary tax case involving the "wages" of an "employed" citizen. Rather, we are here concerned with the operation of a Government program, gradually and carefully developed over a period of many years, to advance the noncompetent reservation Indian to a point where he may become a competent member of our body politic. The petitioner was one of the participants in this program; and his part was to serve his people as the elected treasurer of their tribal community. Congress, through its enactment of the Wheeler-Howard Act, had made provision for the creation of such tribal communities, as another step in preparing the noncompetent Indian for self-government.

The Ninth Circuit, reviewing on appeal, asserted that since no specific treaty or statutory provision exempted this type of income, payments to tribal officers are taxable. The Ninth Circuit observed that although the tribal council was authorized to expend the income earned through communal farming, "the Charter prohibits the making of per capita distributions from these revenues."69

In Holt v. Commissioner,70 a tax exemption was claimed for income derived from a cattle operation on land leased from the Cheyenne River Sioux Tribe. The Indian taxpayer asserted that as a tribal member he was a co-owner of the land and entitled to benefits from the tax exempt status of the tribal land. The Eighth Circuit denied this contention by literally applying the Capoeman doctrine, commenting that taxing the tribal lessee's income could not

65. 370 F.2d at 795.
66. See note 76 infra.
67. 326 F.2d 261 (9th Cir. 1964).
69. Comm'r v. Walker, 326 F.2d 261, 262 (9th Cir. 1964).
70. 364 F.2d 38 (8th Cir. 1966), cert. denied, 381 U.S. 931 1967).
"possibly represent a burden or encumbrance upon the tribe's interest in such land."

In contrast to the Courts of Appeals' decisions in *Walker* and *Holt*, the Court of Claims liberally construed the *Capoeman* decision, and in *Big Eagle v. United States*, found that Osage income is exempt from federal taxation. The Court of Claims observed that mere status as a restricted or tribal Indian does not imply a tax exemption for distribution of tribal income. But, pointing to the provisions of a 1929 Act directing that "all royalties and bonuses" be distributed, it reasoned that "if Federal income taxes are first withheld ALL [the income] will not be turned over to [the Osage Indians]."

### ENLARGING THE INCOME TAX EXEMPTION

No Constitutional or statutory provision expressly exempts tribal property from all forms of taxation, but absent Congressional consent, past efforts to subject tribal assets directly to state taxation have been blocked by the Supreme Court. Thus the Court held in *The Kansas Indians* and *The New York Indians* that as long as

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71. Id. at 41.
72. 300 F.2d 765 (Cl. Ct. 1962).
73. Id. at 771.
74. It has been suggested that the phrase “Indians not taxed” found in U.S. Const. art. I, § 2, cl. 3 and U.S. Const. Amend. XIV, § 2 probably referred to “Indians resident on reservations... not taxed by the States.” See Rice, *The Position of the American Indian in the Law of the United States*, 16 J. Comp. Leg. & Int'l L. (3rd ser.) 78, 80 (1934). But Attorney General Jackson pointed out in 1940 that he was uncertain “whether the phrase ‘Indians not taxed’ refers 1. to Indians not actually paying taxes or only to those not subject to taxation and 2. to Indians not taxed or subject to taxation by any taxing authority or only to those not taxed or subject to taxation by the States in which they reside...” 39 Op. Att'y Gen. 518, 519 (1940). The Solicitor, Department of Interior, however, concluded that “all Indians are today subject to taxation” and in light of the decision in Superintendent v. Comm’r, 295 U.S. 418 (1935), Indians “are entitled to be counted... [for] representatives.” 57 I.D. 195, 207 (1949). The Interior Solicitor’s viewpoint was adopted by the Census Bureau and thereafter all Indians were included in census enumeration. See 87 Cong. Rec. 79 (1941) for Census report following the opinion.
75. The Revenue Service exempts tribal income by interpreting the Internal Revenue Code as only taxing individuals not Indian tribes. See Rev. Rul. 67-284, C.B. 1967-2, 55, 57, reading in part:

- Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.
- Tribal income not otherwise exempt from federal income tax is includible in the gross income of the Indian tribal member when distributed or constructively received by him.
76. The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866), held that treaties with the Shawnee, Wea and Miami Indian Tribes, guaranteeing the Indians sole and exclusive use of land and assuring the Indians that the land would not be levied against for debt, implied exemption from *ad valorem* property taxes. Justice Davis observed that “it is conceded that those [Indians] who hold in common cannot be taxed.” But cf. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, No. 71-183, 40 U.S. L.W. 3390 (Feb. 22, 1972). See The Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (1971); Certiorari granted U.S.
77. In *The New York Indians*, 72 U.S. (5 Wall.) 761, 771, the companion case of *The Kansas Indians*, Justice Nelson pointed out that a county road assessment against tribal
tribal relations exist, the States are precluded from asserting tax jurisdiction upon Indian lands. Federal Courts have analogized from decisions involving state taxation to enlarge Indian immunity from federal taxation. Despite the Walker and Holt decisions, it is believed that adequate reasons, to be explored in this section, exist for holding that the income of individual Indians derived from tribal lands is exempt from federal income tax.

A. The Vested Immunity Theory

Ordinarily a tax exemption is considered a legislative privilege which is narrowly construed. But the Supreme Court has held that Indian landowners who conveyed their aboriginal interests in land in exchange for exemptions from state taxation received a vested property right which could not be removed thereafter by unilateral legislative action. An act of the colonial legislature granting a smaller tract of tax exempt land to a band of Delaware Indians in exchange for their cession of a larger tract was held in New Jersey v. Wilson, to be a contract which could not be abrogated without the approval of the Indians. Speaking for the Court, Chief Justice Marshall commented that the tax exemption was "annexed . . . to the land itself not to their persons." Choate v. Trapp was an action commenced by 8,000 Choctaw and Chickasaw Indians to enjoin the assessment of ad valorem property tax on lands obtained as allotments pursuant to the Atoka Agreement, enacted into federal law by the Curtis Act of 1898. The agreement provided that the allotments in severality were to be lands would violate the Indian Intercourse Act, R.S. § 2116, because enforcement of the tax would permit levy and sale resulting in a conveyance prohibited by the act. But cf. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960), holding that the prohibition against conveyances of tribal land would not preclude the exercise of federal eminent domain.

78. In Carpenter v. Shaw, 280 U.S. 363, 366 (1929), Justice Stone stated that "while in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, . . . the contrary rule is to be applied to tax exemption secured to the Indians by agreement between them and the national government." But, desirous of limiting the exemption, in Heiner v. Colonial Trust Co., 275 U.S. 232, 235 (1927), Justice Stone held that the income of a corporate lessee, controlled by white stockholders, was subject to federal income tax, because Congress intended "to extend the income tax as far as it can to all species of income, despite immunity from state taxation."

79. 11 U.S. (7 Cranch) 164 (1812).
80. Id. at 167.
81. 224 U.S. 665 (1912).
82. See Agreement made between Commission to the Five Civilized Tribes (commonly called the Dawes Commission) with Commission representing the Choctaw and Chickasaw Tribes of Indians on Apr. 23, 1897, Annual Report, Comm'r of Indian Affairs, 409-415 (1897).
inalienable and non-taxable for 21 years; but in 1908, Congress re-
moved the restrictions upon alienation of lands owned by certain
classes of less than full-blood members of the Five Civilized Tribes
and declared that "all land from which restrictions have been or shall
be removed shall be subject to taxation . . . ." Justice Lamar wrote
for the Court:

The right to remove the restriction was in pursuance of the power
under which Congress could legislate as to the status of the ward and
lengthen or shorten the period of disability. But the provision that
the land should be non-taxable was a property right, which Congress
undoubtedly had the power to grant. That right fully vested in the
Indians and was binding upon Oklahoma.

In light of these decisions, it may be argued that treaties which
guarantee Indian tribes exclusive governmental control over their
reservations, granted implied tax immunity and became vested when
the Indian tribes conveyed valuable rights to the United States. But in the only case in which this argument was raised by an Indian
tribe, the Montana Supreme Court rejected it. By the Act of May 29,
1924, Congress granted states the power to tax "the production of
oil and gas and other minerals" located on unallotted tribal lands "in
all respects, the same as production on unrestricted lands . . . ."
The Blackfeet Tribe intervened in a suit brought by its corporate
lessee to enjoin assessment of an ad valorem property tax which was
measured by the net amount of mineral royalties. The tribe argued
that the 1855 Treaty creating the reservation, for the sole and
exclusive use of the Blackfeet Tribe, also granted implied tax
immunity which became vested when the tribe conveyed its
aboriginal land and settled on the reservation. In *British-American
Oil Producing Co. v. Board of Equalization,* the Montana Court

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stated that "Indian occupation of land without governmental recognition of ownership
creates no rights against taking or extinction by the United States protected by the Fifth
Amendment or any other principle of law." Thus it may be argued that cession of aboriginal
possession would be inadequate consideration to support the grant of tax immunity. How-
ever, the waiver of other valuable Constitutional rights including the right to travel freely,
arguably would be adequate consideration to support the reciprocal grant of immunity from
87. *Leases of Unallotted Lands for Oil and Gas Mining Purposes,* 25 U.S.C. § 398
(1963). This has been held by the Interior Department Solicitor to authorize any form of
taxation upon the tribal mineral estate. See *Opinion,* Sept. 20, 1943, 58 I.D. 535.
89. 101 Mont. 293, 54 P.2d 129, aff'd 299 U.S. 159 (1936). The Blackfeet Tribe did not
join in the appeal to the U.S. Supreme Court, hence the tax immunity theory was not
discussed in that opinion.
stated that even "if it is true that the imposition of taxes on royalties . . . is in violation of a treaty . . . [Congress] did not exceed its power in violating the treaty . . . ."90

B. Express Statutory Exemption
Sufficiently broad language is found in § 16 of the I.R.A. to support a conclusion that income of individual Indians derived from tribal property is exempt from federal taxation:91

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. (emphasis added).

Since one of the major purposes of the I.R.A. was to stimulate the economic and social development of Indians through communal activity, it would appear that § 16 contemplated a broad assurance to the Indians that existing protections from taxation would not be destroyed. The aims of the legislation, drafted by the Interior Department, were stated in a memorandum to the Indian Affairs Committees of Congress prepared by the Bureau of Indian Affairs:92

The bill seeks to establish the legal conditions through which the Indian will be released from economic and social imprisonment and will begin to work out a real destiny in America.

It provides him with economic security against the wastage of his assets.

It provides him with a workable plan of land management and development whereby he can achieve economic independence.

It promotes his individual enterprise in farming, livestock growing, and other forms of land use. Community land ownership, where established, will be a means to prevent land alienation and to secure economic land use; but the use of the land will remain primarily individual. (Emphasis added).

The proposed legislation authorized a program to consolidate tribal ownership of grazing and timberland; hence it was probably assumed by Congress that the income of individual members of the tribe earned through development of communal assets would enjoy a tax exemption no less broad than income from allotments.93

93. House Hearings, supra note 12, at 34.
The legislative history of the I.R.A. suggests that § 16 should be interpreted broadly to prevent the alienation of the interests of individual Indians in tribal lands through enforcement of income tax liens. Upon the request of Indian groups, the bill, as first drafted, was amended to prohibit the nonconsensual disposition of tribal lands. Commissioner Collier explained the purpose of the amendment to the House Indian Committee.94

Under existing law, in any one case, the Secretary of the Interior can rent, lease, alienate tribal assets; under this new section that power would be taken away from him and would make all disposal subject to tribal consent.

Almost everywhere we went the Indians raised their voice on that point. It was an old grievance and a proper grievance, we take it, and the Indians wanted that protection.

Senator Wheeler, Chairman of the Senate Indian Affairs Committee, requested the Interior Department to withdraw the original bill and draft a shorter, more compact version.95 The new bill contained language similar to that currently found in § 16.96

94. House Hearings, supra note 12, at 189.
95. At the Senate Hearing on the bill drafted by the Interior Department, Chairman Wheeler stated:

   I will say that I first appointed a subcommittee with the idea of taking the other bill and amending it, but subsequently I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and on yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, but I want to go over it. They are very anxious to get the bill out.

96. Senate Hearings, supra note 95, at 232. The full text of the Interior Department draft is found at 231-234. The language of § 16 of the draft bill was as follows: . . . In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall confer the following rights and powers: to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe;

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), is the only decided case which involved the interpretation of § 16 of the I.R.A., and the Supreme Court held that the statute could not prevent the non-consensual disposition of an executive order reservation in Alaska. The only discussion respecting § 16 is found in the Senate Hearings, supra note 95, at 247:

The Chairman (reading):

To prevent the sale, disposition, lease, and encumbrance of tribal lands, interests in lands or other tribal assets, without the consent of the tribe; to represent the tribe in its relations with the Federal, State, and local Governments.

Senator O'Mahoney. But what you are saying here is that the constitution shall vest in some person—what? The following rights and powers. And then you undertake to enumerate those powers. The first one that you enumerate is the right to employ counsel. The second one is the right to prevent individuals from selling and disposing of their property. Then you come to a third one
Significantly, after the Supreme Court had decided the *Sandy Fox* case, when Congress enacted legislation for Oklahoma Indians creating rights similar to those enacted by the I.R.A., it expressly exempted the interests in land to be acquired for Oklahoma Indians, and it is to represent the tribe, and that seems to me to be hanging up in the air.

The Chairman. The second one you stated incorrectly.

Senator O'Mahoney. Have I?

The Chairman. It is not to prevent them from selling individual lands; it is tribal lands.

Senator O'Mahoney. Yes, that is right; tribal lands.

Felix Cohen, former Solicitor, Department of Interior and principal author of the I.R.A., pointed out that §§ 16 and 17 "were the work of a conference committee which took phrases from the bill that passed the House and other phrases from the bill that had passed the Senate..." therefore the "legislative history prior to the conference report must be used with extreme circumspection..." F. Cohen, *Handbook of Federal Indian Law* 85 (1940). The Conference Report accompanying the final version of the I.R.A. merely states the broad principles to be effected by the legislation. *See* H.R. Rep. No. 2049, 73rd Cong., 2d Sess., *accompanying* S. 3645, the Act of June 18, 1934. Statements made by Commissioner Collier would indicate that in his personal opinion, the I.R.A. was not intended to convey tax exemption.

Mr. Werner. If you are going to give the Indian citizenship, will that permit him to assume the full rights of citizenship?

Mr. Collier. Eminently yes. There is only one element in the Indian situation that would continue to be peculiar. That is, for the time being, at least as far as any of this legislation contemplates, he would be free from local taxation. He pays indirect taxes like the rest of us.

Mrs. Greenway. What does that mean?

Mr. Collier. On real-estate taxes the Indian lands are tax exempt. That is the only peculiarity. Indian lands are not taxable.

Mr. Werner. Personal property may be taxed, and is taxable in many States now, is it not?

Mr. Collier. The Indian pays all the indirect taxes reflected in the cost of living.

Mr. Werner. His property is not taxable.

Mr. Collier. No.

Mr. Werner. He enjoys all the rights of citizenship, but does not participate in any of the direct burdens under the proposed legislation?

Mr. Collier. I think under this plan they participate in all of the burdens except taxation.

Mr. Cartwright. Is it not largely a matter of restricted and non-restricted Indians?

Mr. Collier. Yes.

*House Hearings, supra* note 12, at 64. Writing in the *Washington Post* on May 6, 1934, prior to introducing the redrafted bill, Collier indicated:

Perhaps there is nothing about the whole Allotment Act to which the Indians themselves object so strenuously as the fact that after 25 years their trust period is over, and they get their lands in fee simple with all the responsibilities attached to the white man's way of owning lands. This means many things, but most important, it means that the Indians have to pay taxes. Practically all Indians who have ever had to pay taxes have soon lost their land. The present act, in extending the trust period indefinitely, assures the Indian owners that they will not have to pay taxes on their land. This, however, does not mean that Indians who produce commodities on which they make a substantial income will not have to pay taxes on that income.

*Senate Hearings, supra* note 95, at 323.
from "any and all taxes." It would appear extremely unlikely that Congress intended to exempt Oklahoma Indians from payment of federal income taxation while subjecting the income of Indians from other sections of the country to federal taxes.

A further reason to conclude that § 16 of the I.R.A. creates a broad tax exemption is the fact that the Bureau of Indian Affairs administered the act in a manner which led Indians to believe that interests in land acquired pursuant to the provisions of the I.R.A. would be immune from all forms of taxation. Regional meetings were held with Indian groups while the legislation was pending before Congress, and Indians were told that the bill would not change their present tax exempt status. In his introductory remarks


That the Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

During the Senate Hearings on the bill Vern Thompson, Attorney for the Quapaw Tribe, indicated that the bill, as originally drafted would not be sufficiently broad to exempt the reinvested income of Indian allottees.

Mr. Thompson. May I ask a question there, Mr. Commissioner, in that regard? Where you see the taxes, do you think that is sufficiently broad to cover income tax on reinvested funds of Indians, as is covered by the Sandy Fox case?

Mr. Collier. I am unable to answer that. I have assumed that it was, but I am not a lawyer. Maybe Mr. Reeves has an idea on that.

Mr. Reeves. They asked for certiorari, Judge Thompson, in that Sandy Fox case, to take it up to the Supreme Court of the United States. It involves a very interesting income-tax question, whether the income from the income was subject to income tax or exempt from income tax.

Mr. Vern E. Thompson. We were going to ask an amendment along that line, the Quapaws were, but we were going to include in that not only securities and investments, but all interest or proceeds therefrom, and we thought if we could put that in that would cover any possible attempt to levy tax.

Mr. Collier. Of course, that is to be our policy, if you can get it in.

Mr. Thompson. We would hope to establish that through the bill that is pending.

to a conference held at Hayward, Wisconsin, Robert Marshall, B.I.A. Director of Forestry, stated:98

Now I think everything that there is in this whole 15 pages I can summarize in five sentences—that is everything of importance from the standpoint of the average person. . . . 1. The Indians will keep the land they now own. 2. The Government will buy them more lands. 3. The lands will be owned in such a way that the Indians can really get the benefit of them. 4. They will be managed so as not to ruin them. 5. The tax free period will be continued indefinitely.

In response to a question regarding Indian tax liability under the bill, at a meeting of Oklahoma Indians, Commissioner Collier implied that interests in land acquired pursuant to the I.R.A. would be absolutely immune from all taxation:99

Mr. Roe Cloud: Here is a question from Alfred Wilson of the Cheyenne and Arapaho Reservation: certain members of the Cheyenne and Arapaho Tribe purchased land out of restricted funds which land has been declared taxable on a decision of the Circuit Court of Appeals. Has this bill any provision to pay off back taxes due on said land?

Mr. Collier: Only if the community is willing to use money to pay off those taxes. When legal taxes have accrued they have to be paid. The way the land would be taken out of taxation under the new plan would be by placing the title in the Government. In that way it could be taken safely out of taxation but for taxes that have already accrued legally—they would have to be paid.

Relying upon representations similar to those quoted, many Indians elected to be governed by the provisions of the I.R.A., thereby waiving any future right to an individual allotment and an express income tax exemption.100 The administrative policy followed by the Bureau of Indian Affairs, subsequent to adoption of the I.R.A., of encouraging tribal acquisitions of land was stated by Commissioner Collier in a circular dated June 26, 1936, to Agency Superintendents:101

100. No legal right to an allotment exists before all the discretionary administrative acts required by the General Allotment Act are completed. Arenas v. United States, 322 U.S. 419, 429-434 (1944). But after the administrative steps are completed, an Indian may bring a mandamus action compelling the Secretary of the Interior to allot an Indian reservation even though the land is unsuitable for agricultural purposes. United States v. Payne, 264 U.S. 446 (1924).
The policy of the Indian Service is to encourage the transfer of individually owned Indian land into tribal ownership. Therefore . . . where it is legally possible to take title in the United States, either in trust for the tribe or for individuals, title should always be taken in trust for the tribe unless this is clearly impracticable. If title is taken in an individual, it will perpetuate one of the most undesirable features of the allotment system, that is, the division of the ownership of lands among heirs. Such transactions will receive the approval of this Office only in cases in which no other means of reaching the desired end is available.

The assignment of lands which may be conveyed to the tribe will be handled by the tribal authorities on reservations which organize or incorporate and will be governed by provisions in the constitution or charter. Many of the reservations already have considered the provisions which they believe should be included in the constitution or charter regarding the use of lands by members of the tribe. On reservations which do not organize or incorporate, assignments will be made by the Superintendent with the approval of the tribal authorities. The use of land under assignment is to be encouraged.

The prevailing opinion in the Bureau of Indian Affairs at the time of enactment of the I.R.A. was that no individual Indian’s income was subject to federal income taxation until the Indian was declared “competent” pursuant to specific Congressional legislation or until restrictions on his allotment were removed pursuant to law. Under this view, the Indian’s income from individual use of tribal land was tax exempt equally with his income from his own restricted allotment. Certainly the Collier administration, in its campaign to get allottees to surrender their allotments in return for non-statutory assignments of tribal land, never intended to divest these Indians of their existing income tax exemption. Yet this is the exact result, if Capoeman is interpreted restrictively.

After Sandy Fox, all individual Indian income was thought to be subject to the federal income tax regardless of whether it was derived from allotted or tribal land. The anomaly in federal tax policy came into being when Capoeman restored the tax exemption for income from allotments, but did not deal with the tax status of individual income derived from use of tribal land. The latter problem remains to be decided by the Supreme Court.

It may be argued, that the express tax exemption found in § 5 of the I.R.A. protecting “land or rights acquired . . . from State and local taxation,”\textsuperscript{102} precludes a determination that § 16 of the I.R.A. confers an additional federal tax exemption. But this conten-

\textsuperscript{102} Act of June 18, 1934, ch. 576, § 5, 48 Stat. 985.
tion is refuted by the decision in Shaw v. Gibson-Zahniser Oil Corp.,¹⁰³ where land purchased outside the boundaries of Indian reservations with restricted funds of individual Indians was held by Justice Stone to be subject to state ad valorem property taxes. Since § 5 of the I.R.A. contemplated the purchase of lands within and without the boundaries of Indian reservations, Congress no doubt believed that an express exemption from state taxation was needed to overcome the Gibson-Zahniser rule.

C. The Nature of Individual Interests in Tribal Lands

In the Holt case the Eighth Circuit asserted that no individual Indian has "title or an enforceable right in tribal property."¹⁰⁴ This misconception apparently arises for two reasons. Since any conveyance of tribal land except to the United States is invalid, it has been suggested that the creation of an individual inheritable estate in tribal lands through the tribal law or custom is also prohibited.¹⁰⁵ No judicial support for this view can be located, and historical evidence indicates that the Indian Intercourse Acts were intended to protect the property of Indians only from non-Indian interference.¹⁰⁶

Further confusion arises from misunderstanding of the "pre-emption" and "plenary power" doctrines. In Johnson v. McIntosh,¹⁰⁷ the conveyance of an Indian tribe to white men was

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¹⁰³. 276 U.S. 575 (1928).
¹⁰⁴. 364 F.2d 38 (8th Cir. 1966).
¹⁰⁵. See Opinion of Solicitor, Dep't of Interior, Nov. 21, 1942, 58 I.D. 218, 220, where it is maintained that the creation of an inheritable assignment in tribal lands is prohibited.
¹⁰⁶. Protection of Indians, 25 U.S.C. § 177 (1963). The Solicitor states that: The conclusion that the transaction is in violation of the statute is inescapable. The interest sought to be established in the individual is much more than the bare right of occupancy. For a consideration, it is proposed to convey to the individual Indian a full and complete possessory title with a right to transmit that title by descent or to alienate it by will or by conveyance inter vivos, to other members of the tribe. The element of purchase plus the incidents of descent and alienation stamp the transaction as one designed to individualize the tribal title and create in the individual an enforceable vested interest. Even if it be conceded that such a grant would not be indefeasible so far as the tribe itself is concerned and that the tribe nevertheless retains the power to revoke the grant, this would not preclude the applicability of 25 U.S.C. sec. 177. The whole plan in fact involves an inescapable dilemma. If a mere assignment is contemplated, the goal of security is impossible of achievement. If, on the other hand, a valid "title" or "claim" is created, it must encounter the prohibition of the statute.

No Indian tribe can create an interest in land greater than that which it possesses. Thus, the Supreme Court held in United States v. Chase, 245 U.S. 89 (1917), that an assignment in aboriginal Indian lands may be terminated by subsequent Congressional action allotting the tribal lands in severalty.

¹⁰⁷. See generally F. Prucha, American Indian Policy In The Formative Years 139-87 (1970).
¹⁰⁸. 21 U.S. (8 Wheat.), 543 (1823).
held invalid because Congress possesses the sole power to terminate tribal tenure. In support of this conclusion, Chief Justice Marshall suggested that conveyances from Indians would be subject to tribal law and might be subsequently annulled. However, Marshall specifically recognized that Indian tribesmen could hold their tribal lands in severalty: 108

Admitting... [Indian tribal] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still, it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title.

In Lone Wolf v. Hitchcock, 109 the court held that Congress has the constitutional power to force the allotment of tribal lands into severalty within an Indian reservation established by treaty. Justice White held that the manner in which Congress exercised its plenary power over Indian tribal property was a political question, 110 commenting that allotment was "a mere change in the form of Indian tribal property..." 111 Subsequently, Justice Cardozo pointed out in Shoshone Tribe v. United States, 112 that the plenary power "to control and manage the property and affairs of the Indians... does not extend so far as to enable the Government 'to give the tribal lands to others or to appropriate them to its own purposes without rendering compensation... for that would not be an exercise of guardianship but an act of confiscation..." 113

Where an Indian tribe possesses title, recognized by treaty or statute, no principle of law would prevent an Indian tribe from creating in favor of its own members individual inheritable estates in tribal

108. Id. at 593.
110. Justice White states, 187 U.S. at 565, that "plenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."
111. 187 U.S. at 568.
112. 299 U.S. 476 (1937).
113. Id. at 494. Reluctant to conclude that Congress exercised its eminent domain power, the Court of Claims has distinguished the Lone Wolf and Shoshone cases on the ground that in Lone Wolf a "good faith effort" was made to transmute property into money; Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968). But cf. Friedman, Interest on Indian Claims: Judicial Protection of the Fisc, 5 Valparaiso U.L. Rev. 25, 34-37 (1970), discussing the incorrect assumption made by the Court of Claims that Congress cannot exercise two constitutional powers simultaneously.
lands. Traditionally the Indian tribes have accorded individual land tenure created by their custom a respect similar to that which the Fifth and Fourteenth Amendments accord non-reservation property interests. Recently, the Indian Bill of Rights reinforced the


115. Individual Navajo Indians obtained personal rights in grazing lands which are referred to as "fenced pastures". In deference to the rights of individuals, the Navajo Tribe seldom exercises its power of eminent domain if a member does not voluntarily relinquish his interest to the tribe. Conversation with Laurence A. Davis, former Associate General Counsel, Navajo Tribe, Feb. 11, 1972. The author is indebted to Mr. Davis for his many thoughtful suggestions to improve the intellectual quality of this article. Cohen suggests in Cohen, supra note 114, at 188, that "the right of the [Indian] occupant has been likened to a licensee or tenant at will. But in order to assure the occupancy of land some security in his possession, tribal law and custom may recognize his right of possession to the extent that the right of occupancy may not be rendered at the mere caprice of tribal officials." In 1937, Cohen stated, that:

The extent of our ignorance of the basic facts of Indian land tenure if amazing. One might read in an hour all that anthropologists have had to say on this subject. Administrators and research workers alike have usually dismissed the subject with the observation that private property in land did not exist. This is a misleading half-truth. It is probably true that, among most tribes, the individual Indian could not sell land to a white man, but this is hardly a negation of private property. Under any system of land tenure there are restraints on alienation, and in the great citadel of individual land tenures from which our common law is derived there have been times when most of the land in the country could not be sold to anyone. We do know that in many Indian tribes lands have been individually utilized for purposes of gardening, fishing, or trapping. Where such individual use is socially recognized there is inevitably an unwritten code defining the limits and conditions of this interest in the land, and the methods of transferring it to others either inter vivos or at death. In some cases, as in the Rio Grande Pueblos, there may be well-defined forms of governmental procedure in the assignment of lands for cultivation and revocation of assignment for non-use. Among other Indian groups, methods of appropriating tribal land to individual use may depend upon the strength or prestige of the individual claimant. But it is safe to say that in every Indian tribe some individual interest and some social obligations are attached to the land.


At the time of the treaties that conveyed the Eastern lands, the Eastern property was used by the occupants under common rights. This is the manner in which all tribal lands were held. There were exceptions for individuals where some particular sections or a part of a section was patented to them by the United States. Such titles departed from the Indian concept of use of tribal-occupied land. The unbroken rule of law from Johnson v. McIntosh, ... to date is that Indian title, unrecognized by the United States by treaty or patent, covers the right to use only, a right that may be withdrawn by the Government at any time without liability for compensation. This right to use the land is, however, the property of the band, tribe, or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. No instance is known of individual ownership of tribal lands.
Indian customary law by prohibiting Indian tribes from depriving "any person . . . of property without due process of law."\textsuperscript{116} Thus individual interests in communal lands not only are recognized by Indian tribes, but the arbitrary revocation of such interest would probably give rise to a federal cause of action, justiciable in federal courts.\textsuperscript{117} Federal law periodically has recognized individual interests in tribal lands.\textsuperscript{118} An example of this policy is found in § 2 of the General Allotment Act which directs that the severalty interest of an Indian allottee shall "embrace the improvements of the Indian making the selection."\textsuperscript{119} Usually the surface farming or grazing rights to tribal lands are leased\textsuperscript{120} or assigned\textsuperscript{121} to indi-

\textsuperscript{116} The Indian Bill of Rights, 25 U.S.C. § 1302(8) (1968), reads in part:
No Indian tribe in exercising powers of self-government shall:
(8) deny to any person within its jurisdiction the equal protection of its laws
or deprive any person of liberty or property without due process of law;


\textsuperscript{118} In condemning Indian tribal lands for the Allegheny River Reservoir, the government joined all the Indian assignees and lessees as defendants, and these Indians were awarded compensation for their interests in the lands. Several decisions held that the value of the Indian's interest was increased by the fact that the land was exempt from \textit{ad valorem} property taxes. Thus the tax exempt status of the land was to be considered as an added increment of value in determining the fair market value of the tribal lands. See United States v. 205.03 Acres of Land, 251 F. Supp. 858 (W.D. Pa. 1966), and United States v. 160.40 Acres of Land (unreported Civ. Nos. 10433 etc. W.D.N.Y. Feb. 10, 1970), aff'd per curiam (unreported No. 218 2nd Cir. Nov. 18, 1970). See also Cohen, supra note 114, at 190, n. 108, for a list of federal statutes providing for compensation for Indian improvements on tribal lands which were condemned or destroyed. In Healing v. Jones, 174 F. Supp. 211, 216 (D. Ariz. 1959), the special three-judge panel held that the Act of July 22, 1958. 72 Stat. 402, created "a vested equitable interest" either in individual Indians or in the tribe in land set aside for Indian use by Executive Order. See also Whitefoot v. United States, 293 F.2d 658 (Ct. Cl., 1961), cert. denied, 369 U.S. 818 (1961), where the federal statute declaring that Indian property was necessary for a dam site specifically granted compensation to tribal groups. An agreement was subsequently executed to provide for a method to compensate for individual improvements.


\textsuperscript{120} In United States v. City of Salamanaca, 31 F. Supp. 60, 61 (W.D.N.Y. 1939), the government brought suit to set aside a tax deed on the Indian leasehold of tribal land. In determining that the leasehold interest was not taxable, the Court pointed out that "in 1892 a lease of such lands was executed by the Seneca Nation to Fidelia Pierce to run for 99 years." Art. X, § 3, Oglala Sioux Tribe of Pine River Reservation Constitution adopted pursuant to § 16 of the I.R.A., states:

Sec. 3. Leasing of tribal lands.—Tribal lands may be leased by the tribal council, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

In the leasing of tribal lands preference shall be given, first, to Indian communities or cooperative associations, and, secondly, to individual Indians who are members of the Oglala Sioux Tribe. No lease of tribal land to a non-member shall be made by the tribal council unless it shall appear that no Indian community or cooperative association or individual member of the
vidual tribesmen either formally or by acknowledged custom. Minerals and timber are sometimes exploited through leases to non-

tribe is able and willing to use the land and to pay a reasonable fee for such use.

Grazing permits covering tribal land may be issued by the tribal council, with the approval of the Secretary of the Interior, in the same manner and upon the same terms as leases.

Article 5(3) of the Lac du Flambeau Chippewa corporate charter adopted pursuant to §17 of the I.R.A. distinguishes between tribal leasehold interests requiring approval of the Interior Department and tribal permits which are not conveyances of land and therefore do not require approval by the Interior Department:

No leases, permits (which terms shall not include land assignments to members of the Tribe) or timber sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of the Lac du Flambeau Reservation shall be made by the Tribal Council for a longer term than five years, and all such leases must be approved by the Secretary of the Interior or by his duly authorized representative; but mining and other leases may be made for longer periods as authorized by law and by the Constitution and By-laws of the Tribe.

See also Buster v. Wright, 735 Fed.2d 947, 950 (8th Cir., 1905), appeal dismissed 203 U.S. 599 (1906), where the tribal power to grant land permits was upheld.

121. The Constitution adopted by the Oglala Sioux Tribe of the Pine River Reservation pursuant to the I.R.A. grants two types of land assignments—inheritable exchange assignments and standard assignments for life. Art. X §§ 4 and 5 of the Constitution, reads in part:

Sec. 4. Grant of standard assignments.—In any assignment of tribal lands which are now owned by the tribe or which may be hereafter purchased for the tribe by the United States, or purchased by the tribe out of tribal funds, preference shall be given, first, to heads of families which are entirely landless, and, secondly, to heads of families which have no allotted lands or interests in allotted lands but shall have already received assignments consisting of less than 20 acres of agricultural land, or other land or interests in land of equal value.

Sec. 5. Tenure of standard assignments.—If any member of the tribe holding a standard assignment of land shall, for a period of two years, fail to use the land so assigned or shall use such land for any unlawful purpose his assignment may be cancelled by the tribal council after due notice and an opportunity to be heard and the said land may be reassigned in accordance with the provisions of section 4 of this article.

Upon the death of any Indian holding a standard assignment, his heirs or other individuals designated by him, by will, or written request, shall have a preference in the reassignment of the land, provided such persons are members of the Oglala Sioux Tribe who would be eligible to receive a standard assignment.

The Hopi Constitution adopted pursuant to the I.R.A. affirms the property rights of individual Indians obtained through customary land assignment. But tribal grazing lands and all fresh water springs are to be managed by the Tribal Council. Art. VII of the Constitution states:

Section 1. Assignment of use of farming land within the traditional clan holdings of the villages of First Mesa, Mishongnovi, Sipaulavi, and Shungopavi, and within the established village holdings of the villages of Kyakotsmovi, Bakabi, Oraibi, Hotevilla, and Moenkopi, as in effect at the time of approval of this Constitution, shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution, adopted according to the provisions of Article III, section 4. Unoccupied land beyond
Indians. On several reservations, however, tribally owned sawmills process the cut timber, and Indian-operated mines also exist.\(^{1,2}\)

Prior to allotment, a body of law had evolved to govern the legal relations of persons, including non-Indians, claiming rights arising from land assignments made to members of the Five Civilized Tribes. Jurisdiction in federal courts was obtained through the fiction of labeling the land assignments, “improvements,” and treating them as personalty. The Eighth Circuit recognized in *Shulthis v. McDougal*,\(^{1,2}\) that an Indian improvement was in reality an estate in land:

> The term “improvements,” as here used, meant not only betterments, but occupancy.... These “improvements” passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof.... While the legal title to the tribal property belonged to the tribe as a political society, the the clan and village holdings mentioned shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council. Nothing in this article shall permit depriving a member of the Tribe of farming land actually occupied and beneficially used by him at the time of approval of this Constitution, but where an individual is occupying or using land which belongs to another by agreement with the owner, that land shall continue to belong to that owner.

Sec. 2. In order to improve and preserve the range, range land shall be supervised by the Tribal Council in cooperation with the various United States Government agencies.

Sec. 3. All springs shall be considered the property of the Tribe, and no individual or group of individuals shall be allowed to prevent the reasonable use of any spring by members of the Tribe generally, but the individual who develops a spring, or on whose land it is, shall have the first use of it.

Sec. 4. The administration of this article shall be subject to the provisions of section 6 of the Act of June 18, 1934.

*See also* Turner v. United States, 248 U.S. 354, 355 (1919), where the Court points out that an 1889 law of the Creek Nation granted each citizen family head the right to enclose one square mile for grazing without payment of compensation.


> All minerals, in, on or under any lands under the jurisdiction of the Pueblo are and shall continue to remain the property of the Pueblo of Laguna and not of the person having the right to use or hold the surface of the land in, on or under which such minerals may exist or be found. The Council shall have the power to authorize removal of any such minerals with the approval of the Secretary of the Interior so long as his approval is required by law. All proceeds derived from the removal of any minerals shall be placed in the general Pueblo treasury to be expended as authorized by this revised Constitution. Any mining lease shall provide that the lessee shall compensate the Pueblo for any injury to the improvement or occupancy of any lands assigned to individuals under this Article caused by the use of the surface by the lessee. Compensation so received shall be paid over to such individual so injured.

beneficial use of the same had at all times belonged to the members in severalty.

The creation of preferential interests, such as the leaseholds of tribal land granted the taxpayer in the _Holt_ case, clearly was contemplated by § 5 of the I.R.A. Commissioner Collier informed the House Indian Affairs Committee that:  

> You have got to have flexibility. If the Secretary has to go out and by purchase acquire large new areas of land, or get them in some other way, he is going to be guided by readiness to use the land. He is going to assign land to those who want to live on it and work on it. But in all those cases, subject to these conditions, you will observe that the individual who surrendered the land acquires a correspondingly greater equity in preferential use. Ordinarily, the appropriation regarding the use of areas would not be done by the Secretary at all but by the chartered community.

Difficulty in determining a statutory basis for preferential leaseholds exists because it is incorrectly assumed that interests created pursuant to the I.R.A. must be held in trust for the individual by the United States. The statutory history of § 5 shows that this assumption is not true. As originally drafted, the legislation directed the Interior Secretary “to acquire, through . . . assignment any interest in land, water rights or surface rights to lands . . . for Indians,” and take title to the land or rights “in the name of the United States in trust for the Indian tribe . . . .” To afford individual Indians access to the credit provisions of the I.R.A., the last sentence of § 5 was amended to read that title shall be taken in trust “for the Indian tribe or individual Indian . . . .” However, the first sentence was not changed, creating the incorrect impression that a preferential individual interest in tribal lands is recognized by the act, only, if title to such interest is held in trust for the individual Indian.

Section 2 modifies all existing laws in that it states, “Hereafter no tribal or other land of any Indian reservation or community created or set apart by treaty or agreement with the Indians, act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to an Indian.” It stops allotment in severalty. That is, it stops allotment in severalty, as under the allotment acts, general and special. It would not stop assignment. It would not stop all kinds of arrangements insuring individual landholding. They are contemplated under the bill, but it would stop allotment in severalty, with the conveyance as a title to an individual.

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124. _House Hearings, supra_ note 12, at 126. Previously Commissioner Collier had indicated that, although the bill would prohibit further allotment, assignments of tribal lands would be permitted.

125. _Senate Hearings, supra_ note 95, at 232.

126. _Senate Hearings, supra_ note 95, at 235.
D. Policy Considerations

Unless the income derived from tribal land is held to be tax-exempt, the Indian interests therein would be subject to levy and execution upon nonpayment of federal income tax, further threatening the preservation of the Indian land base. Land in an Indian reservation is considered by tribal members to be of greater value than merely a source of revenue; the reservation is the Indian homeland, the cultural foundation. Attempting to alleviate Indian fear that a federal tax lien would automatically attach to any property of a taxpayer upon nonpayment of income tax, the government informed the Ninth Circuit in its brief in the *Stevens* case, that "Treasury regulations are now being processed to provide that a noncompetent Indian's interest in land shall not be considered his property for purposes of lien or levy."\(^{127}\)

Indian interests in land are not specifically exempted by § 6334(a) I.R.C.\(^{128}\) Thus it would appear that the validity of such a regulation is extremely doubtful, in light of § 6334(c) I.R.C.\(^{129}\) stating that "no property or rights to property shall be exempt from levy other than property specifically made exempt by subsection (a)." In effect the Treasury proposed to protect income from Indian land indirectly, by amending the tax code through administrative interpretation. The relationship of these two subsections was explained recently by Justice Blackman in *United States v. Mitchell*.\(^{130}\)

What is exempt from levy is specified in § 6334(a). Section 6334(c) provides, "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection(a)." This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law.

Exempting income derived from tribal lands would encourage Indian tribes to institute voluntary land consolidation and cooperative land management programs in a manner specifically authorized by § 5 of the I.R.A. Significantly, the *Holt* case involved the Cheyenne River Sioux Reservation where tribal land ownership increased from 492,000 acres in 1937 to in excess of one million acres in 1966.\(^{131}\) The Cheyenne River Tribe offered its members in-

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130. 403 U.S. 190, 204-205 (1971).
heritable assignments of tribal land in exchange for their individual allotments. Additional preferential leasehold rights for cattle grazing were made available to tribal members under the tribal constitution.  

Other Indian tribes are experimenting in the other direction, combining individual estates to promote more efficient use of Indian land. The Colorado River Tribal Council has proposed a plan to withdraw all existing individual assignments in tribal land and operate a joint truck farming business. Under the plan, profits from the joint venture would be distributed per capita. Since the

132. Art. VIII § 3 of the Cheyenne River Sioux Tribe I.R.A. Constitution reads:

Tribal lands may be leased by the tribal council, with the approval of the Secretary of the Interior for public, religious, educational, recreational, residential, or business purposes for a period not to exceed 25 years and may include a provision authorizing a renewal or an extension for one additional term of not to exceed 25 years, but no one lease or contract shall be for a tract in excess of 160 acres.

Grazing permits covering tribal land may be issued by the tribal council, with the approval of the Secretary of the Interior. Such grazing permits shall not exceed a term of five years.

In the leasing of tribal lands and the issuance of grazing permits preference shall be given first to Indian cooperative associations, and, secondly, to individual Indians, who are members of the Cheyenne River Sioux Tribe. No lease of tribal land to a non-member or the issuance of a grazing permit to a non-member shall be made by the tribal council unless it shall appear that no Indian cooperative association or individual member of the tribe is able and willing to use the land and to pay a reasonable fee for such use.

133. The explanation of the proposal distributed to each tribal member contained the following information:

D. Suggested in Lieu of Land Assignment Program

Make no more land assignments but instead issue each eligible person one share certificates in the funds made available for distribution annually by the Tribal Council. This could be a per cent of the tribal income or a set amount to be determined by the Tribal Council.

F. Operation Rules

1. Each eligible shareholder to be paid his share on March 1st of each year.
2. Applicants who become eligible for the first time upon reaching the age of 21 will receive the first payment of their share in the year following the first year they were 21 on December 31st.
3. The Tribal Council to include in their budget each year the amount to be paid shareholders. The Tribal Council may wish to limit the amount that could be budgeted for payment on shares—say not to exceed 50% of the annual income from agricultural lands.
4. Shares to a family head on Welfare to be held in IIM and budgeted by the superintendent.
5. Assignments of home sites will be made on land designated for that purpose by the Tribal Council.

G. Comments

1. Projected future tribal income indicates that before many years have passed the share will provide tribal members more income than the lease income from assignments. When this situation exists, those with assignments, allotments, and interests will turn them in to the tribes exchange for shares. This will automatically solve the fractionated land problem and enable the land to be farmed in economic units.
average subsistence farm today requires a minimum of 300 acres, and a successful cattle ranching business necessitates at least 2,000 acres.\textsuperscript{134} It is apparent that the allotments made to individual Indian families under the General Allotment Act are quite inadequate to support a prosperous family agricultural business. Federal tax policy should recognize that modern agricultural techniques require greater masses of land and support cooperative development by exempting income derived by individuals through use of communal land.

At times it has been suggested that Indians should be encouraged to leave the reservations, train for other jobs and relocate in other areas of the country, because the Indian land base is not sufficient to support the present reservation population. During the 1950's, the Bureau of Indian Affairs actively promoted a program to stimulate the relocation of Indians. Currently, in light of the widespread unemployment, few people argue that relocation is a suitable solution. But relocation would be a disastrous policy regardless of the economic climate. The Indian, having strong clan and communal ties, soon discovered that the relocation programs merely offered to exchange rural poverty for a faceless urban ghetto and frequently returned to the safety and security of his reservation homeland.

A solution to poverty more suitable to the Indian personality would be a policy of land redistribution.\textsuperscript{135} Approximately 450,000 reservation Indians possess roughly 51 million acres of land, of which amount nearly one-half is unsuitable for agricultural purposes.\textsuperscript{136} In contrast, the 283 million acres of land, available for grazing, pursuant to the Taylor Grazing Act,\textsuperscript{137} are used by 23,000 white livestock owners.\textsuperscript{138} Assuming that each stockman's family consists of five plus persons (a figure high in light of the current birthrate), the figures reveal that a mere 116,000 white people, one-fourth of the

\begin{itemize}
  \item 2. Should a tribal member wish to establish himself in the business of farming he would be able to negotiate a farm operator's lease for tribal land to farm. The funds he received from his share would probably pay his lease fees.
  \item 3. If after study and revisions the Tribal Council finds this plan desirable it should be explained thoroughly to tribal members at several community meetings. The people should be asked to express their opinions on the proposal, possibly by voting on its acceptance.
\end{itemize}

Hough, supra note 122, at 69-70.


135. The history of federal land policies was recently explored in Barnes, The Great American Land Grab, 164 New Republic Nos. 23, 24, and 25. See also reply by Bard, Correspondence, 165 New Republic Nos. 8 and 9.

136. See Indians Voice Alarm on Shrinking Resources, Feb. 27, 1972, N.Y. Times § 1, at 37, col. 2.


total tribal Indian population, enjoy the use of nearly six times the
amount of land available to Indians. Yet with the rare exception of
the Blue Lake Act,\textsuperscript{139} retroceding to the Taos Pueblo its religious
lands, no Congressional voice has been raised to suggest that Indian
poverty be alleviated by restoring a portion of our excess public
lands to Indian ownership.

Since Indian tribes do not have adequate resources to compete
with non-Indian communities for securing the relocation of busi-
nesses, the income tax exemption would, to some degree, reduce the
advantage that the non-Indian community already has. Commercial
site development, including sanitation, must be financed by Indian
communities at commercial interest rates. Non-Indian communities
finance site development with municipal bonds bearing interest fully
exempt from federal income tax. Of course, non-Indian businesses
locating on the reservation would be subject to federal income
tax.\textsuperscript{140} Congress should consider, however, a special five-year Indian
development incentive, returning all federal income tax collected
from relocated non-Indian businesses to the tribal council to be used
exclusively for expanding municipal services. Such subsidy, if limited
to a five-year test period, could be thoroughly reviewed at the
expiration of that period of time.\textsuperscript{141}

CONCLUSION

There is no valid distinction between an Indian property interest
established by the General Allotment Act and an inheritable interest
in tribal land created by tribal law or custom. Exempting the former
from Federal Income Tax and subjecting the latter to federal taxation
is inherently inequitable. The Indians, of course, view any attempts
to subject their interests in tribal lands to taxation with great alarm.
Federal tax exempt status is considered to be a treaty right; a
promise supported by the integrity of the United States. Recently,
the Indian viewpoint was well stated by David Long (Crazy Horse),
Vice President of the Oglala Sioux Tribal Council:\textsuperscript{142}

Democratic Party pledges to return surplus federal lands to Indian tribes. See N.Y. Times,
July 13, 1972, at 1, col 16.


\textsuperscript{141} The newly enacted residential rehabilitation incentive permitting fast five-year
depreciation of costs to rehabilitate older rental property for low-income families was
enacted for a five-year test period after which time the incentive will be reviewed. See Int.
Rev. Code of 1954, § 167K. Federal income tax collected in the Virgin Islands is returned
directly to the Territorial Government for use in the Virgin Islands. See Virgin Islands, 48

\textsuperscript{142} Statement of David Long (Crazy Horse), Vice President Oglala Sioux Tribe, Pine
River Reservation at Press Conference, Hearing Room, Indian Claims Commission,
We also understand that proposals are now being considered to change the special tax status of our property. The tax exempt status of Indian lands was part of the bargain when Indian peoples sold vast areas of this country to the United States. The tax exemption is one of the ways in which the United States is paying us for what we were compelled to give up. I simply cannot believe that in this day, when the wrongs suffered by American Indians are becoming much more fully understood, the American people would go along with another breach of faith by the Federal Government to my people.

Sept. 27, 1971. In general the preferential tax treatment accorded Indians may be looked upon as a form of welfare payments or negative income tax. Until a family assistance plan is adopted, the Indian tax exemption should not be removed. Cf. Surrey, Federal Income Tax Reform; The Varied Approaches Necessary to Replace Tax Expenditures With Direct Governmental Assistance, 84 Harv. L. Rev., 352, 368 (1970). Professor Surrey suggests that nontaxable income such as workmen's compensation, social security and public assistance payments should not be subject to federal income tax until a family assistance program is enacted, because the federal tax laws currently do not measure negative income. For similar reasons it would appear inherently unfair to remove the Indian income tax exemption until a family assistance program is adopted. Indians are among the poorest people in the nation with an average family income of under $3,000.