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7 ATTORNEY CONTRACTS WITH INDIAN TRIBES7.1 General

- A. Purpose. To give general information relating to contracts for general counsel, special services, and for the prosecution of claims against the United States.
- B. Scope. All attorney contracts with Indian tribes are required by statute to be approved by the Secretary or his duly authorized representative. (25 USCA, 70n, 81, 85, Illustrations 1 and 2, 25 USCA 473a, 476, 477, 503, Illustrations 1, 2 and 3, 83 IAM 6)
- C. Separate Contracts for Each Type of Service. Although the same counsel may be retained for all purposes, a separate contract should be executed and approved for each class of service. In order to expedite subsequent actions, each type of contract should be retained in a separate file.
- D. Negotiation of Contracts. Attorney contracts with tribes organized under the Indian Reorganization Act, Alaska Act and the Oklahoma Indian Welfare Act, shall be negotiated and executed in accordance with the requirements of those statutes and provisions of the applicable tribal constitution, bylaws and charter. (25 USCA 476, 477, 473a, 503. Illustrations 1, 2 and 3, 83 IAM 6)

Attorney contracts with tribes which do not have constitutions under the Indian Reorganization Act shall be negotiated and executed in accordance with the requirements of Title 25, USCA, Secs. 81 and 85. (Illustration 2)

Any member of a tribe having no recognized tribal organization, may enter into a contract in behalf of the tribe with an attorney for the prosecution of claims. Such contract must be executed in accordance with Section 2103 of the United States Revised Statutes. (25 USCA, Secs. 81, 85 and 70n. Illustrations 1 and 2)

- E. Selection of Attorneys. Selection of attorneys by tribes having written organizational documents shall be by the body authorized in the tribe's constitution and bylaws to negotiate contracts in behalf of tribe. An appropriate resolution shall be adopted by such body showing the name

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of the contracting party (attorney) selected and the names of the tribal members authorized to execute the contract on behalf of the tribe. A copy of the resolution bearing the manual signatures of the tribal officials attesting to its adoption shall be attached to all copies of the contract.

Selection of attorneys by tribes having no formal organization and of tribes whose organizational documents do not delegate authority to the governing body to make such selection, shall be by general council. (25 CFR 71 and 72)

A general council for such purpose shall be called in accordance with the constitution or, in the absence of a procedure in the tribe's constitution, in accordance with customary tribal procedure. In the absence of these procedures, the Superintendent shall call a meeting of a general council. (25 CFR 72.8)

Such general council shall by resolution:

- (1) Designate the contracting party or attorney.
- (2) Designate and authorize a committee to act in behalf of the tribe in executing the contract or agreement.
- (3) The general council should include in the resolution:
  - (a) Name and address of contracting party or attorney.
  - (b) Duration or life of the contract or agreement.
  - (c) Compensation to be paid; how, when and by whom.
  - (d) Names of tribal representatives authorized to execute a contract or agreement in behalf of the tribe.
  - (e) Any special instructions or requirements deemed necessary.

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A copy of the resolution, bearing the manual signature of the presiding officer of the general council, attested to by the secretary of the general council, and certified by the Superintendent or other proper official, shall be attached to each copy of the contract.

- F. Execution of Contracts. Contracts with tribes having constitutions shall be executed under the authority contained in the provisions of the approved tribal constitution.

Contracts with all other tribes shall be executed in accordance with the provisions of applicable laws and regulations. (25 USCA 81, Illustration 2)

- G. Transmittal of Contracts. Contracts shall be submitted in quintuplicate. Two copies shall bear the manual signatures of all parties. If the contract is required to be executed before a judge of a court of record, the two copies bearing the written signatures of the parties shall also have affixed certificates bearing the written signature of the judge of the court of record and of the clerk of the court. The remaining three copies may bear typed signatures of the parties and the judge of a court of record and the clerk of the court.

All copies should be forwarded to the Superintendent for transmittal to the Commissioner of Indian Affairs through the Area Director, together with a report and recommendation by the Superintendent. The report should cover, among other things, the Superintendent's opinion of the need for said contract, the tribal funds available for payment of fees and expenses, and the effect of such payment upon other budgeted expenses of the tribe. The Area Director should add his comments and recommendations to the Superintendent's report when transmitting the contract to the Commissioner of Indian Affairs.

A contract providing payment of fees and expenses from tribal funds should be accompanied by a resolution adopted in accordance with the tribal constitution appropriating sufficient tribal funds for the payment of fees and expenses as provided by the contract.

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When the compensation and expenses are to be paid from local funds, the amount of such funds held in the tribal treasury, not otherwise appropriated and available for payment of fees and expenses, shall be stated.

- H. Form of Contracts. A tribal council or representative body having authority or power to employ an attorney in behalf of a tribe may obtain a tentative form of contract from the Commissioner of Indian Affairs. The request should include a statement of the scope of the intended employment, whether as attorney for prosecution of claims, general counsel, or for some other particular case or purpose.
- I. Recognition. Failure of an attorney to qualify under the rules established by law and regulations regarding attorney recognition before the Interior Department is deemed sufficient cause for disapproval of any attorney contract. (43 CFR 1.1 to 1.7, Illustration 3)
- J. Review Factors. In considering an attorney contract submitted for approval, the following factors, among others, will be taken into consideration:
- (1) Whether the contract is prepared and submitted in accordance with existing law, regulations and tribal constitutions. (25 USCA 81, Illustration 2; 43 CFR 1.1 to 1.7, Illustration 3)
  - (2) The total number of claims and general counsel contracts held by the attorney, either directly or by assignment.
  - (3) The extent of the attorney's interest in the contracts.
  - (4) Past performance under contracts.
  - (5) Location of home office of attorney and size of staff.
  - (6) Whether tribe has funds available to pay attorney.

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(7) Whether services to be rendered under contract are commensurate with the compensation stated therein.

K. Appeals. An appeal by any interested party to the Secretary from a decision of the Commissioner of Indian Affairs may be filed within 60 days after notice of decision. The appeal should be filed with the Commissioner of Indian Affairs and must be accompanied by a brief, setting forth fully the arguments upon which the appeal is based. The notice of appeal, appellant's brief, and the complete record must be transmitted promptly by the Commissioner of Indian Affairs to the Secretary.

7.2 Contracts for General Counsel Services.

A. Separate Contract for General Counsel. A separate contract for general counsel services should be drawn up and approved in accordance with existing law and regulations. (25 USCA 81, Illustration 2; USCA 473a, 476, 477, Illustrations 2 and 3, 83 IAM 6)

B. Duties of Attorney. The contract should contain a full statement of the duties and may be stated in general terms if duties are not limited. It customarily includes general legal services of the character usually performed by general counsel, including necessary representation of the tribe before the Department of the Interior, Committees of Congress and courts and other governmental agencies or departments of both Federal and State governments having any duty or control over the affairs of the tribe, but it shall not include the prosecution of any claims against the United States. The statement shall also specify the performance of any duties specifically desired by the tribe, such as attendance at council meetings, and may provide for advance authorization by the tribe before undertaking a particular job.

C. Fees. The attorney's fee may be a definite sum payable annually, quarterly, or monthly, or it may be a fixed charge for each hour or day's service rendered. In the case of a definite sum, hourly or daily fee, its reasonableness in the light of the needs of the tribe and the tribe's ability to pay shall be considered. In the case

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of an hourly or daily fee, the contract shall (a) specify a maximum annual limitation on the fee and may provide that such limitation can be exceeded if a larger sum is first authorized by the tribe and approved by the Commissioner, and (b) require the submission of periodic bills for services rendered.

- D. Expenses. The contract may specify the types of expenses for which the attorney will be reimbursed, such as actual travel expenses or mileage allowance in lieu of actual travel expenses, actual subsistence expenses or per diem in lieu of subsistence, telephone and telegraph costs, costs of printing briefs or other documents required in connection with litigation, and cost of stenographic or clerical services not performed by the attorney's regular office staff during regular office hours.

The contract should prohibit reimbursement for general office overhead expenses, such as rent, light, heat, local telephone and postage.

The contract shall specify a maximum yearly limitation on the amount of expenses for which the attorney may be reimbursed, unless a larger sum is approved by the tribe and by the Commissioner of Indian Affairs.

- E. Payment of Fees and Expenses. The contract shall provide that the payment of all fees and expenses shall be made upon the submission of vouchers for approval by the Commissioner of Indian Affairs or his duly authorized representative. Vouchers for reimbursement of attorney expenses shall also be approved by the tribe. Such vouchers shall comply and be transmitted in accordance with the instructions contained in 42 IAM 6.6.11.
- F. Availability of Funds. The contract shall make the obligation of the tribe to pay fees and expenses subject to the availability of funds in the tribal treasury or from an appropriation of tribal funds by Congress.

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- G. Term of Contract. The contract shall be for a specific term of years, but should be limited to three years unless justifications are submitted.
- H. Termination. The contract shall contain a provision for its termination by the Commissioner of Indian Affairs for satisfactory cause with the consent of or at the request of the tribe upon 60 days written notice to the attorney. The contract may also provide for its termination by either party by giving 30 days written notice to the other party. The contract may not be terminated by resignation by the attorney but both parties may agree to terminate the contract and waive the time specified for giving notice as set forth in the contract.
- I. Contract Assignment. The terms of the contract shall prohibit any assignment of the attorney's obligations, rights, or fees under the contract, in whole or in part, or the employment or association of other attorneys without the prior approval of the tribe and the Commissioner of Indian Affairs.

An assignment by the attorney of a partial interest shall include statements showing the division of fees and the responsibility for furnishing the service required under the contract.

Unless the compensation retained by the attorney is commensurate with the duties retained by him, a special justification shall be submitted with the request for approval. (25 USCA 84, Illustration 2; 25 USCA 473a, 476, 477, Illustrations 2 and 3, 83 IAM 6).

- J. Reports. The contract shall provide for periodic reports, not less frequently than semi-annually, to the tribe and to the Commissioner of Indian Affairs, indicating the services performed under the contract. The services performed will be considered in connection with the need for the continuance of the contract at the fee prescribed in the contract or any increase. The report required by this subsection shall be in addition to that required by 25 USCA 82.

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K. Selection of Counsel from Nearby Areas. When choosing a general counsel, the tribe should seriously consider the selection of an attorney or firm from the general area if most of the legal work of the tribe arises out of local situations that must be dealt with locally in the first instance, and the Superintendent's report shall indicate the extent of such consideration. The choice of general counsel from outside the general area should be based upon the need for substantial legal services elsewhere, or other good reasons.

7.3 Contracts for the Prosecution of Claims Against the United States.

- A. Separate Contract for Claims. A contract to represent a tribe in claims matters should be drawn up and executed separate and apart from a contract the attorney may have for general counsel services.
- B. Duties of Attorney. The contract shall contain a clear and concise statement of the duties to be performed by the attorney, which shall include an investigation of claims identified either specifically or by reference to claims that may be prosecuted under the Indian Claims Commission Act or a special jurisdiction act, advice to the tribe regarding the results of the investigation, and the prosecution of the claims to a conclusion in the court of final resort.
- C. Fee - Contingent. The compensation or fee of the attorney shall be contingent upon a recovery for the tribe in an amount not to exceed 10 percent of the recovery to be fixed by the Indian Claims Commission or Court of Claims if the matter is litigated or by the Commissioner of Indian Affairs if the matter is settled without litigation. Since the Indian Claims Commission or Court of Claims is in a better position after conclusion of a case to determine the value of the services rendered by an attorney, fixed fees of a stated amount of 10 percent or less are not usually in the best interest of the tribe and any contract containing a provision for a fixed fee must be fully justified.

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- D. Expenses. In the absence of special justification approved by the Commissioner of Indian Affairs and made a part of the record, the reimbursement of attorney's expenses in connection with the investigation and prosecution of the claim shall be made payable from the recovery for the tribe, if any, and the amount of such expenses shall be subject to determination by the court, Commission or Commissioner of Indian Affairs as the case may be. Any agreement by the tribe to pay expenses regardless of the outcome of the litigation shall be specifically justified, shall be limited in amount, shall be subject to the availability of funds within a specified and limited time, and shall provide for the payment of expenses on the basis of proper vouchers submitted for approval by the tribe and the Commissioner of Indian Affairs or his authorized representative.
- E. Term. The contract shall be for a specified number of years not to exceed ten. The contract may provide for an extension at the request of the attorney by the Commissioner of Indian Affairs, after consultation with the tribe, for additional periods not exceeding two years each if the claim has not been prosecuted to a conclusion.
- F. Termination. The contract shall contain a provision for its termination by the Commissioner of Indian Affairs for satisfactory cause with the consent of or at the request of the tribe upon 60 days written notice to the attorney. The contract may not be terminated by resignation of the attorney but may be terminated by the Commissioner immediately if both parties waive the time specified for giving notice as set forth in the contract.
- G. Contract Assignment. The terms of the contract shall prohibit any assignment of the attorney's obligations, rights, or fees under the contract, in whole or in part, or the employment or association of other attorneys without the prior approval of the tribe and the Commissioner of Indian Affairs.

An assignment by the attorney of a partial interest shall include statements showing the division of fees and the responsibility for furnishing the service required under the contract.

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Unless the compensation retained by the attorney is commensurate with the duties retained by him, a special justification shall be submitted with the request for approval. (25 USCA 84, Illustration 2; 25 USCA 473a, 476, 477, Illustrations 2 and 3, 83 IAM 6). However, an assignment or association shall not be approved if there is reasonable cause for belief that it is in furtherance of a claim brokerage plan or practice.

- H. Reports. The contract shall provide for the submission of special reports when requested by the tribe or by the Commissioner of Indian Affairs and for the submission of periodic reports, not less frequently than semi-annually, to the tribe and to the Commissioner of Indian Affairs indicating the work done by the attorney under the contract and evaluating his progress in the investigation and prosecution of the claims. The initial report shall outline the claim and indicate the scope of investigation necessary and the progress made to date. Subsequent reports shall indicate plans for filing the petition within the statutory time limit and the progress made in assembling evidence and preparing for trial. Such a report need not disclose confidential information, evidence, or litigation strategy.

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(PUBLIC LAW 726 - 79TH CONGRESS)  
(CHAPTER 959 - 2D SESSION)  
(H. R. 4497)  
(60 Stat. 1049)  
AN ACT

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

- (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
- (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
- (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
- (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and

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demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief for distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

#### MEMBERSHIP APPOINTMENT; OATH; SALARY

Sec. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of \$10,000 per year. At all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: Provided further, That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

#### TERM OF OFFICE; VACANCIES; REMOVAL

(b) The Commissioners shall hold office during their good behavior until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the

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original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

#### NOT TO ENGAGE IN OTHER VOCATIONS OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

#### QUORUM

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

#### STAFF OF COMMISSION

Sec. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

#### OFFICES

Sec. 5. The principal office of the Commission shall be in the District of Columbia.

#### EXPENSES OF COMMISSION

Sec. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefor approved by the Chief Commissioner or other member or officer designated by the Commission.

#### TIME OF MEETINGS

Sec. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

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RECORD

Sec. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

Sec. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

Sec. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

TRANSFER SUITS FROM COURT OF CLAIMS

Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: Provided, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: Provided further, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

LIMITATIONS

Sec. 12. The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

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#### NOTICE AND INVESTIGATION

Sec. 13 (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.

#### CALLS UPON DEPARTMENTS FOR INFORMATION

S Sec. 14. The Commission shall have the power to call upon any of the departments of the Government for any information it may deem necessary, and shall have the use of all records, hearings, and reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business.

At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party, and the appropriate department of the Government of the United States shall give to the attorneys for all tribes or groups full and free access to such letters, papers, documents, maps, or records as may be useful to said attorneys in the preparation of any claim instituted

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hereunder, and shall afford facilities for the examination of the same and, upon written request by said attorneys, shall furnish certified copies thereof.

#### REPRESENTATION BY ATTORNEYS

Sec. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C., sec. 476), shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U.S.C., secs. 81, 82-84).

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

#### NO MEMBER OF CONGRESS TO PRACTICE BEFORE COMMISSION

Sec. 16. No Senator or Member of or Delegate to Congress shall, during his continuance in office, practice before the Commission.

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#### HEARING

Sec. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

#### TESTIMONY

Sec. 18. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths and examine witnesses. Any member of the Commission may require by subpoena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpoenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

#### FINAL DETERMINATION

Sec. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counter-claims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

#### REVIEW BY COURT OF CLAIMS

Sec. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct

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questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On the said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U.S.C., sec. 288), as amended.

#### REPORT OF COMMISSION TO CONGRESS

Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims;

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and (3) a statement of how each Commissioner voted upon the final determination of the claim.

#### EFFECT OF FINAL DETERMINATION OF COMMISSION

Sec. 22 (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final ~~determination~~ determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in this controversy.

#### DISSOLUTION OF THE COMMISSION

Sec. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period of limitation set forth in section 12 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

#### FUTURE INDIAN CLAIMS

Sec. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive Orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group.

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In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C., sec. 250), as amended: Provided, however, That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, band, or groups. (Sec. 24 was repealed by the Act of May 24, 1949 (63 Stat. 102), and is now incorporated as section 1505 of Title 28 U.S.C.)

#### EFFECT ON EXISTING LAWS

Sec. 25. All provisions of law inconsistent with this Act are hereby ~~repealed~~ to the extent of such inconsistency, except that existing provisions of law authorizing suits in the Court of Claims by particular tribes, bands, or groups of Indians and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted thereunder save as provided by section 11 hereof as to the deduction of payments, offsets, counterclaims, and demands.

Sec. 26. If any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other applications of such provisions, shall not be affected.

Approved August 13, 1946.

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Section 2103, Revised Statutes (25 U.S.C. 81)

"81. Contracts with Indian tribes or Indians. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to

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him at the time the parties present making the same; the source and extent of his authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid. (R. S. 2103)"

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Section 2104, Revised Statutes (25 U.S.C. 82)

"82. Payments under contracts restricted. No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of services under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid and, if not, it shall be paid in proportion to the services rendered under the contract.  
(R. S. 2104)"

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Section 2105, Revised Statutes (25 U.S.C. 83)

"83. Payments under prohibited contracts; aiding in making prohibited contracts. The person so receiving such money contrary to the provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment for not less than six months, and by a fine of not less than \$1,000. And it shall be the duty of all district attorneys to prosecute such cases when applied to do so, and their failure and refusal shall be ground for their removal from office. Any Indian agent, or other person in the employment of the United States, who shall, in violation of the provisions of the preceding section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments are here prohibited, shall in addition to punishment herein imposed on the person making such contract, or receiving such money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same. (R. S. 2105)"

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Section 2106, Revised Statutes (25 U. S. C. 84)

"84. Assignments of contracts restricted. No assignment of any contracts embraced by section 81, or of any part of one shall be valid, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon. (R. S. 2106)"

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Section 18, Act of June 30, 1913 (38 Stat. 97) (25 U.S.C. 85)

"85. Contracts for compensation for services in relation to enrollment in Five Civilized Tribes. Unless the consent of the United States shall have previously been given, all contracts made with any person, or persons, applicants for enrollment as citizens in the Five Civilized Tribes for compensation for services in relation thereto, are declared to be void and of no effect, and the collection or receipt of any moneys from any such applicants for citizenship shall constitute an offense against the laws of the United States, punishable by a fine of not exceeding \$500 or imprisonment ~~for~~ not exceeding six months, or both, and lands allotted to such applicants whether Indians or freedmen shall not be affected or encumbered by any character contracted prior to the time at which said land may be alienated under the laws of the United States. (Aug. 1, 1914, c. 222, 17, 38 Stat. 601)"

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Section 8, Act of July 4, 1884 (23 Stat. 97) (25 U.S.C. 88)

"88. False vouchers, accounts, or claims. Any disbursing or other officer of the United States, or other person, who shall knowingly present, or cause to be presented, any voucher, account, or claim to any officer of the United States, for approval or payment, or for the purpose of securing a credit in any account with the United States, relating to any matter pertaining to the Indian Service, which shall contain any material misrepresentation of fact in regard to the amount due or paid, the name or character of the article furnished or received; or of the service rendered, or to the date of purchase, delivery, or performance of service; rendered, or to the date of purchase, delivery, or performance of service, or in any other particular, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected: Provided, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentations: And provided further, That the officers and persons by and between whom the business is transacted shall, in all civil actions in settlement of accounts, be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim: And provided further, That the foregoing shall be in addition to the penalties prescribed by law, and in no way affect proceedings under existing law for like offenses. Where practicable this section shall be printed on the blank forms of vouchers provided for general use. (July 4, 1884, c. 180, 8, 23 Stat. 97)"

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TITLE 43 - CODE OF FEDERAL REGULATIONS

Part 1 - Practice Before the Department of the Interior

Sec.

- 1.1 Purpose.
- 1.2 Definitions.
- 1.3 Who may practice.
- 1.4 Disqualifications; Federal officers and employees, and spouses.
- 1.5 Disqualifications; former Federal officers and employees, and spouses.
- 1.6 Signature to constitute certificate.
- 1.7 Disciplinary proceedings.

AUTHORITY: Secs. 1.1 to 1.7 issued under sec. 5, 23 Stat. 101; 5 U.S.C. 493.

SOURCE: Secs. 1.1 to 1.7 appear at 19 F. R. 9388, Dec. 31, 1954.

Prior Amendments

1954: 19 F. R. 8835, Dec. 23.

Sec. 1.1 Purpose. This part governs the participation of individuals in proceedings, both formal and informal, in which rights are asserted before, or privileges sought from, the Department of the Interior.

Sec. 1.2 Definitions. As used in this part the term:

(a) "Department" includes any bureau, office, or other unit of the Department of the Interior, whether in Washington, D. C., or in the field, and any officer or employee thereof;

(b) "Solicitor" means the Solicitor of the Department of the Interior or his authorized representative;

(c) "Practice" includes any action taken to support or oppose the assertion of a right before the Department or to support or oppose a request that the Department grant a privilege; and the term "practice" includes any such action whether it relates to the substance of, or to the procedural aspects of handling, a particular matter. The term "practice" does not include the preparation or filing of an application, the filing without comment of documents

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prepared by one other than the individual making the filing, obtaining from the Department information that is available to the public generally, or the making of inquiries respecting the status of a matter pending before the Department.

Sec. 1.3 Who may practice. (a) Only those individuals who are eligible under the provisions of this section may practice before the Department, but this provision shall not be deemed to restrict the dealings of Indian tribes or members of Indian tribes with the Department.

(b) Unless disqualified under the provisions of sec. 1.4 or sec. 1.5 or by disciplinary action taken pursuant to sec. 1.7:

(1) Any individual who has been formally admitted to practice before the Department under any prior regulations and who is in good standing on December 31, 1954, shall be permitted to practice before the Department.

(2) Attorneys at law who are admitted to practice before the courts of any State, Territory, or the District of Columbia will be permitted to practice without filing an application for such privilege.

(3) An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of (i) a member of his family; (ii) a partnership of which he is a member; (iii) a corporation, business trust, or an association, if such individual is an officer or full-time employee; (iv) a receivership, ~~depository~~ estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary; (v) the lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney; (vi) a Federal, State, district, or territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or (vii) an association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.

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Sec. 1.4 Disqualifications; Federal officers and employees, and spouses. (a) No officer or employee of the Department, except in the proper discharge of his official duties, and no spouse of such person may practice before the Department.

(b) Except in the proper discharge of his official duties, no officer or employee of the United States, or of any corporation in which the United States has a proprietary interest, or of the District of Columbia may practice before the Department (1) in relation to any matter respecting which the United States is a party or directly or indirectly interested if he is to receive any compensation for his services, or (2) in the prosecution or support of any claim against the United States. If the matter is not a claim against the United States, and if he will receive no compensation for his services, he may practice in relation to the matter upon first making a showing to that effect and obtaining permission from the Solicitor. This paragraph does not apply in so far as an individual may have been exempted by or pursuant to statute from section 281 or 283, Title 18, of the United States Code.

Sec. 1.5 Disqualifications; former Federal officers and employees, and spouses. (a) No individual who has been an officer or employee of the United States, or of a corporation in which the United States has a proprietary interest, or of the District of Columbia, within two years next after he has ceased to be so employed, may practice before the Department in the prosecution of any claim against the United States which was pending in the Department during the period he was so employed. This paragraph does not apply in so far as an individual may have been excepted by or pursuant to statute from section 190 of the Revised Statutes (5 U.S.C. 99).

(b) No individual may practice before the Department with respect to any matter to which he personally gave consideration or as to which he personally gained knowledge while serving as an officer or employee of the United States, or of a corporation in which the United States has a proprietary interest, or of the District of Columbia.

(c) No individual shall knowingly assist or accept assistance from, or share fees with, any person with respect to any matter before the Department to which the latter person gave consideration personally or as to the facts of which the latter person gained

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knowledge personally while serving as an officer or employee of the United States, or of a corporation in which the United States has a proprietary interest, or of the District of Columbia.

(d) (1) A former officer or employee of the Department may not practice before the Department or render any assistance to persons other than the personnel of the Department with respect to any matter which was pending before the Department during the period of his employment, without first obtaining the permission of the Solicitor. Such permission will not be granted, within two years next after he has ceased to be so employed, with respect to any such matter constituting a claim against the United States, except in so far as he may have been excepted by or pursuant to statute from section 190 of the Revised Statutes (5 U.S.C. 99). Such permission will not be granted if it appears that the proposed representation or assistance would be unlawful, unethical, or contrary to the public interest.

(2) In applying for such permission an individual shall file a certificate or affidavit stating: (i) His former position with the Department; (ii) the nature of the matter in connection with which he desires to act; (iii) the extent, if any, to which he had knowledge of, or was responsible for, or gave personal consideration to, or performed work that was related in any way to, such matter during the period of his employment; and (iv) the circumstances surrounding his employment to handle the matter.

(3) The limitations imposed in subparagraph (1) of this paragraph with respect to a former officer or employee of the Department are likewise applicable to the spouse of such officer or employee. In submitting a certificate or affidavit under subparagraph (2) of this paragraph, the spouse of a former officer or employee will supply, with respect to subdivisions (i) and (iii) of that subparagraph, data concerning the former officer or employee.

Sec. 1.6 Signature to constitute certificate. When an individual who appears in a representative capacity signs a paper in practice before the Department, his signature shall constitute his certificate (a) that under the provisions of this part and the law, he is authorized and qualified to represent the particular party in the matter; and (b) that he has read the paper; that to the best of his knowledge, information, and belief there is good ground to support its contents; that it contains no scandalous or indecent matter; and that it is not interposed for delay.

Sec. 1.7 Disciplinary proceedings. (a) Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Department on grounds that he is incompetent, unethical, or unprofessional, or that he is practicing without authority under the provisions of this part, or that he has violated any provisions of the laws and regulations governing practice before the Department, or that he has been disbarred or suspended by any court or administrative agency. Persons practicing before the Department should observe the Canons of Professional Ethics of the American Bar Association and those of the Federal Bar Association, by which the Department will be guided in disciplinary matters.

(b) Whenever in the discretion of the Solicitor the circumstances warrant consideration of the question whether disciplinary action should be taken against an individual who is practicing or has practiced before the Department, the Solicitor shall appoint a panel to consider and dispose of the case. The panel shall give the individual adequate notice of, and an opportunity for a hearing on, the specific charges against him. The hearing shall afford the individual an opportunity to present evidence and cross-examine witnesses. The panel shall render a decision either (1) dismissing the charges, or (2) reprimanding the individual or suspending or excluding him from practice before the Department.

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AUTHORITY OF THE SECRETARY RESPECTING THE  
APPROVAL OF CONTRACTS BETWEEN INDIAN TRIBES AND ATTORNEYS

Organized Tribes -- Unorganized Tribes -- Secretarial Discretion

A statutory provision empowering organized Indian tribes to employ counsel subject only to the requirement that the choice of counsel and the fixing of fees shall be subject to the approval of the Secretary of the Interior supersedes, as to such employment, a prior statutory provision regulating in general terms the contractual relations of Indian tribes with private parties.

Where contracts between unorganized Indian tribes and attorneys are required by statute to comply with certain specific requirements in addition to the requirement of receiving the approval of the Secretary of the Interior, the Secretary's authority is not limited to examining such contracts for compliance with the specific statutory requirements, but he may consider such a contract as a whole, including any provisions unrelated to the specific statutory requirements, and approve or withhold approval as his judgment may dictate.

Under a statutory provision governing the employment of attorneys by organized Indian tribes, which imposes the requirement of receiving the approval of the Secretary of the Interior only as to the choice of counsel and the fixing of fees, approval by the Secretary of contractual provisions wholly unrelated to the choice of counsel or the fixing of fees is not required, and the Secretary cannot properly require the inclusion in such a contract of provisions having no reasonable relationship to the choice of counsel or the fixing of fees.

Under a statutory provision empowering organized Indian tribes to employ attorneys subject to the approval of the Secretary of the Interior respecting the choice of counsel and the fixing of fees, the Secretary is vested with wide discretion in determining what factors should be taken into account in passing upon the choice of counsel and the fixing of fees, and he may grant or withhold his approval upon the basis of whatever grounds he deems to be properly related to these matters, provided his action is not arbitrary or capricious.

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The exercise of authority by the Secretary of the Interior over contracts between Indian tribes and attorneys does not constitute an unlawful interference with the free choice of counsel by Indian tribes, since the Secretary's authority is conferred by statutes enacted by the Congress in the exercise of the plenary power possessed by that body over Indian tribes and their affairs.

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
Washington 25, D.C.

June 22, 1951

M-36069

Memorandum

To: The Secretary

From: The Solicitor

Subject: Authority of the Secretary respecting the approval of contracts between Indian tribes and attorneys.

This responds to your request for an expression of my opinion on the scope of your authority under the applicable statutory provisions relating to the approval of contracts between Indian tribes and attorneys. It appears from your memorandum that the opinion is desired as a guide in the preparation and promulgation of new regulations governing the negotiation, execution, and consideration of such contracts.

The applicable statutory provisions are now codified in 25 U.S.C., 1946 ed., as sections 81 and 476.

Section 81 is derived from section 2103 of the Revised Statutes, which, in turn, was based upon section 3 of the act of March 3, 1871 (16 Stat. 544, 570), and sections 1 and 2 of the act of May 21, 1872 (17 Stat. 136). Section 81 reads in part as follows:

"No agreement shall be made by any person with any tribe of Indians \* \* \* for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

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\* \* \* \* \*

"Second. It shall \* \* \* bear the approval of the Secretary of the Interior \* \* \* 1/ indorsed upon it.

\* \* \* \* \*

"All contracts or agreements made in violation of this section shall be null and void \* \* \*."

Section 81 does not specifically mention contracts between Indian tribes and attorneys. Such contracts are, however, plainly covered by the section if they provide for services relating to any one or more of the matters specified in the section. It appears, in fact, that the impositions to which the Indians had been subjected by unscrupulous members of the legal profession constituted an impelling reason for the enactment of the legislation. As was pointed out in a memorandum dated January 22, 1946, from the Solicitor to the Commissioner of Indian Affairs:

"This legislation was enacted to protect the Indians in their contractual dealings with attorneys and agents, a field in which the Indians were not without sad experience. The Indians had previously been the victims of monstrous and shameful frauds perpetrated by agents and attorneys, and this legislation which drastically curtailed the right to contract was obviously intended as an extreme measure designed to remedy what was regarded as a great evil. \* \* \*"

Section 476 is derived from section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 987). This section authorizes Indian tribes to organize, and it provides that the constitution adopted by any Indian tribe "shall vest in such

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1/ The omitted words are "and the Commissioner of Indian Affairs." By Reorganization Plan No. III of 1950 (15 F. R. 3174), the authority to approve contracts conferred on the Commissioner by section 81 was transferred to the Secretary.

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tribe or its tribal council" the power, among others, "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior."<sup>2/</sup>

As the earlier statutory provision (section 81), is, by its terms, applicable to all tribes residing within the territorial limits of the United States, and as the later statutory provision (section 476) is applicable only to those tribes which have adopted constitutions under it, the question arose whether section 476 had superseded section 81 with respect to contracts between organized tribes and attorneys. In answering this question in the affirmative, the Solicitor said in a memorandum dated January 23, 1937: <sup>3/</sup>

"\* \* \* To the extent of any conflict or inconsistency, it is clear that section 16 is controlling and supersedes the prior law. Requirements of the prior law not directly inconsistent or conflicting may also be superseded as to the particular kind of contract to which section 16 applies if such was the intent of Congress. A consideration of the general background and purpose of the Indian Reorganization Act leaves no doubt that the purpose of the statutory provision in question was to increase the scope of responsibility and discretion afforded the tribe in its dealings with attorneys. Earlier

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<sup>2/</sup> The employment of counsel for the prosecution of claims of the tribes against the United States is dealt with in section 15 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1053, 25 U.S.C., 1946 ed., sec. 70n). This section requires that attorneys for Indian tribes which are organized under the provisions of the Indian Reorganization Act be selected pursuant to the constitution and bylaws of the tribes. These constitutions and bylaws usually paraphrase the provisions in section 476 which require the choice of counsel and the fixing of fees to be approved by the Secretary of Interior. The employment of attorneys by other claimants is subjected to the provisions of section 81.

<sup>3/</sup> The text of this memorandum appears in the Handbook of Federal Indian Law at p. 281.

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drafts of legislation contained provisions limiting the fees that might be charged. After considerable discussion before the Senate Committee (Hearings before the Committee on Indian Affairs, United States Senate, 73rd Congress, 2d session, S. 2755 and S. 3645, part 2, pages 244-247), it was decided that the Secretary of the Interior should have the added power to approve or veto the choice of counsel. This discussion would have been futile and the statutory provision would have been meaningless if the intention had been to make those contracts subject to the provisions of section 81, Title 25 of the Code."

As the view expressed by the Solicitor in 1937 appears to be correct, the question of the scope of the Secretary's authority must be separately considered under sections 81 and 476.

I

Section 81 prescribes a number of requirements which a contract of employment between an Indian tribe and an attorney must meet, in addition to the requirement that the contract must bear the Secretary's approval indorsed upon it. These specific statutory requirements operate to limit the Secretary's discretion, in that none of them can be dispensed with by the Secretary, <sup>4/</sup> and it is the duty of the Secretary to see to it that the requirements are met by any contract coming before him for approval. It does not follow, however, that the Secretary's authority is limited to examining proposed contracts for compliance with the statutory requirements, and that the Secretary cannot withhold his approval for reasons unrelated to the specific requirements of the statute. The contract itself may well contain many provisions which are unrelated to the specific statutory requirements, and inasmuch as the contract in its entirety is subject to the Secretary's approval, the Secretary clearly would be authorized to consider the contract as a whole, including any provisions unrelated to the specific statutory requirements, and approve or withhold approval as his judgment might dictate.

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<sup>4/</sup> 18 Op. Atty. Gen. 498 (1886); McMurray v. Choctaw Nation, 62 Ct. Cl. 458 (1926), cert. denied 275 U. S. 524.

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"The statute is plain in its provisions - that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate."

See also, to the same general effect, Davis v. Williford, 271 U. S. 484 (1926).

Of course, the authority conferred upon the Secretary by section 81, although very broad, is not unlimited. Approval of a contract could not be withheld capriciously or on purely arbitrary grounds. Moreover, as the power to contract is vested in the tribe, the Secretary could not initiate or make a contract for a tribe. <sup>5/</sup> Subject to these limitations and to the observance of the specific requirements imposed by section 81, it is my opinion that the discretionary authority vested in the Secretary under that section is broad enough to empower the Secretary to grant or withhold approval of contracts between Indian tribes and attorneys in accordance with his view as to what is necessary or advisable in order to protect the interests of the Indians, and to prescribe in advance the terms and conditions which a contract between an Indian tribe and legal counsel must contain in order to meet with the Secretary's approval.

## II

The provisions of section 476 which are pertinent to the present inquiry circumscribe the limits of the Secretary's authority by confining the requirement of Secretarial approval, in so far as contracts between organized Indian tribes and attorneys are concerned, to the choice of counsel and the fixing of fees. In this

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<sup>5/</sup> Mott v. United States, 283 U.S. 747, 751 (1931); Midland Oil Co. v. Turner, 179 Fed. 74 (8th Cir., 1910); Jennings v. Wood, 192 Fed. 507 (8th Cir., 1911).

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It was the purpose of Congress in section 81 to provide statutory safeguards that would be binding on the Indians and their attorneys, and on the Department as well, but Congress apparently realized the impracticability of covering by statute in advance every factor that should be taken into account and, hence, provided for the additional safeguard of Secretarial approval. In doing so, it was the evident intention of the Congress to enable the Secretary to condition his approval upon such other requirements as he might deem to be necessary for the protection of the Indians.

In LaMotte v. United States, 254 U. S. 570 (1921), the Supreme Court upheld the validity of regulations promulgated by the Secretary of the Interior for the purpose of prescribing in advance the terms and conditions which leases should contain in order to meet his approval under a statute which authorized the Indians to make such leases "subject only to the approval of the Secretary of the Interior." After pointing out that the failure of the leasing provision to say anything about regulations was unimportant, and that the power to make regulations for the purpose of carrying the leasing provision into effect would be implied, the Supreme Court said (p. 577):

"Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval."

Statutes providing for the approval by the Secretary of the Interior of contracts made by Indians are numerous, and, whenever the courts have been called upon to consider such statutes, they have uniformly held that the power of approval carries with it wide discretionary authority to determine the conditions under which approval will be granted. Thus, in Anicker v. Gunsburg, 246 U. S. 110 (1918), the Court had under consideration the power of the Secretary under section 2 of the act of May 27, 1908 (35 Stat. 312), which provided that leases of restricted lands of members of the Five Civilized Tribes in Oklahoma might be made with the approval of the Secretary of the Interior, under rules and regulations prescribed by him, and not otherwise. The Court said (p. 119):

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respect, the section differs materially from section 81, under which the contract in its entirety is subject to Secretarial approval. The considerations which may be invoked for withholding approval under section 476 from a contract made by an organized tribe with legal counsel must, therefore, bear some reasonable relationship either to the choice of counsel or to the fixing of fees. For example, as contract provisions wholly unrelated to these matters are not subject to the Secretary's approval, any attempt to require the inclusion in a contract of such unrelated provisions as a condition precedent to the granting of Secretarial approval would be beyond the scope of the Secretary's authority under this section. See Work v. Mosier, 261 U.S. 352 (1923); Ballinger v. Frost, 216 U.S. 240 (1910).

Wide discretion is, however, vested in the Secretary with regard to determining what considerations ought to be taken into account under section 476 in passing upon the choice of counsel and the fixing of fees. Subject to the traditional limitations against arbitrary or capricious action, I believe that the Secretary may grant approval to or withhold approval from a contract between an organized tribe and legal counsel for any reason or reasons which he deems to be properly related to the choice of counsel or the fixing of fees. <sup>6/</sup> Similarly, the Secretary may promulgate regulations prescribing in advance the terms and provisions relating to these matters which a contract between an organized tribe and legal counsel must contain in order to receive his approval.

### III

The foregoing discussion outlines in general terms the scope of the Secretary's authority under sections 81 and 476 and the limitations upon the exercise of such authority. This general treatment is necessary for the reason that it is not possible to foresee and provide for every possible contingency or eventuality that might call for the exercise of the Secretary's authority under these respective sections. The views expressed will, I hope, supply guidance for the formulation of regulations governing the employment of attorneys by Indian tribes.

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<sup>6/</sup> See, in this connection, Southern Pacific Co. v. Olympian Co., 260 U. S. 205 (1922); Sunderland v. United States, 266 U. S. 226, 235 (1924).

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In the formulation of the views stated in this memorandum, consideration has been given to the comments made by lawyers and others on a memorandum that was issued by the Commissioner of Indian Affairs on November 9, 1950. None of the arguments made, and none of the authorities cited, in those comments requires that the views expressed above be modified in any way.

One erroneous thought which appears to run through the various comments received by the Department should be mentioned. This is that the exercise by the Secretary of authority such as I have outlined would interfere with the free choice of counsel by Indian tribes and, therefore, would be unlawful. This objection is without merit, since the Secretary's authority is derived from statutes validly enacted in the exercise of the plenary power possessed by Congress over the property and affairs of Indian tribes. Lone Wolf v. Hitchcock, 187 U. S. 553, 565 (1903); United States v. Kagama, 118 U. S. 375, 384 (1886); United States v. Sandoval, 231 U. S. 28, 43 (1913); United States v. Nice, 241 U. S. 591 (1916); Bowling v. United States, 233 U. S. 528 (1914); Winton v. Amos, 255 U. S. 373 (1921). That this power extends to the regulation of the contract relations between Indians and private parties is no longer open to question. See Pasley v. Union National Bank, 278 Pac. 621 (Okla., 1928); Osage Motor Co. v. Pappin, 281 Pac. 217 (Okla., 1929); Osage Motor Co. v. United States, 33 F. (2d) 21 (8th Cir., 1929), cert. denied 280 U. S. 577.

Whether the existing restrictions on the power of Indian tribes to employ attorneys of their own choice should be removed in whole or in part is a matter for determination by the Congress. Until that body acts, the existing restrictions are binding on the Indians and their attorneys, and also on the Department.

(Sgd.) Mastin G. White  
Solicitor

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
Washington 25, D. C.

January 31, 1946

MEMORANDUM for Assistant Secretary Chapman.

Attached is a letter to William L. Paul, Jr., concerning a contract of employment between Mr. Paul and the Tlingit Indians of the Village of Douglas, Alaska. There is also attached a letter relating to a contract of employment between the Seneca-Cayuga Tribe of Indians of Oklahoma, and N. M. Coursolle and W. C. Preus. In both letters it is suggested that contracts may be executed between individual Indians and attorneys and that it is only where payment of fees or expenses out of restricted funds under the control of this Department is contemplated that approval of such contracts becomes necessary.

A question has been raised as to the applicability of 25 U. S. C. sec. 85 to such individual contracts. That section provides:

"No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given. (June 30, 1913, c. 4 sec. 18, 38 Stat. 97.)"

It is my opinion that section 85 does not apply to contracts between individual Indians and attorneys unless specific tribal funds or property held by the United States are the subject matter of the contract. It has no application where it is contemplated merely that a claim is to be prosecuted against the United States by such Indians. The legislative history of section 85 indicates that the type of contract which it was intended to prohibit dealt with tribal funds or property which the United States was holding in trust for the Indians. The legislative history also reveals that it was the intention of Congress that such funds or property should be delivered to the Indians undiminished in quantity and without the necessity for the employment of attorneys, and the consequent payment of fees to them, to prod the Government to do something which it was already obliged to do. (50 Con. Rec., pp. 2043-2046, 2080-2082.) Therefore, I believe that the language which has been used in the two attached letters concerning contracts between individual Indians and the respective attorneys is legally correct.

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(sgd.) Warner W. Gardner  
Solicitor

125184

Memorandum, January 31, 1946

**ATTORNEY CONTRACTS -- APPLICABILITY OF 25 U. S. C. SEC. 85 TO CONTRACTS  
WITH INDIVIDUAL INDIANS.**

Section 85, U. S. C. does not apply to contracts between individual Indians and attorneys unless specific tribal funds or property held by the United States are the subject matter of the contract.

**GARDNER, Solicitor:**

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
Washington

February 5, 1946

William L. Paul, Jr.,

Juneau, Alaska

Dear Mr. Paul:

Mr. Don C. Foster, General Superintendent of the Alaska Native Service, has referred to the Commissioner of Indian Affairs the contract of employment whereby the Tlingit Indians of the Village of Douglas, Alaska, employed Mr. L. Frederick Paul and yourself to represent them in the investigation, formulation, and prosecution of their claims "arising out of tribal ancestral possessory rights to land and water of a legal or equitable nature."

On August 24, 1944, the Solicitor for this Department, after considering a contract similar to the one now here, stated: "The voluntary organizations that have been set up under the Wheeler-Howard Act of May 1, 1936, and its extension, comprise only part of the population of these communities, and therefore cannot validly claim what is the property of the entire community." The contract in question does not purport to be of the Douglas Indian organization, however, but with the residents of Douglas acting in general council, as the resolution of February 5, 1945, states that a meeting was held by "members of the band and clans of the town of Douglas." An examination of our records discloses that the town of Douglas was started in 1886 as a mining town rather than as a native village. The following is quoted from an economic survey of the town of Douglas made in 1940:

"Some or most of the Tlingit Indians living in Douglas, arrived at the time gold mining in the vicinity was started. They were originally from the Taku country and from a clan of the same name. Some came from Auk Bay and Tyee Harbor, some from Klukwan, some from other villages."

The Tlingit Indians residing in Douglas, therefore, do not constitute a band but rather are merely individual members of other bands located elsewhere. I have not, therefore, approved the contract.

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The residents of the Town of Douglas, as such individual members of other bands, may employ counsel for the protection of their individual rights without approval of the contracts by this Department. The matter of fees is one for determination by the parties to the contracts, but it should not be contemplated that payment would be made from funds under the control or supervision of this Department.

The contract is returned herewith.

Sincerely yours,

(sgd.) Oscar L. Chapman  
Assistant Secretary

Enclosures

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
WASHINGTON

February 5, 1946

N. M. Coursolle and W. C. Preus, Esqs.  
1020 Rand Tower  
Minneapolis 2, Minnesota

Gentlemen:

This will refer to a contract of employment between the Seneca-Cayuga Tribe of Indians of Oklahoma and yourselves, dated July 2, 1941, which was submitted to the Commissioner of Indian Affairs under date of July 16, 1945, by Hon. Henrik Shipstead. For your information, there is enclosed a copy of a letter dated July 25, 1945, from the Assistant Commissioner of Indian Affairs to Senator Shipstead.

The contract provides that it shall be the duty of the attorneys to represent the tribe in the investigation, formulation and prosecution of tribal claims against the United States "growing out of any treaties between the said Indians and the United States or with any State or Territory or with any person or persons or any laws of Congress." (Underscoring supplied.) It is difficult to determine how the Indians would have ~~claims~~ against the United States growing out of treaties between the Indians and States, Territories, or individual persons.

This Department has no knowledge of any claims which the Seneca-Cayuga Tribe may have against the United States. The Superintendent of the Quapaw Agency has advised the Commissioner of Indian Affairs that Mr. Louis Allen Youpe of McGregor, Minnesota, held several meetings with the Seneca-Cayuga Tribe in 1941, prior to the execution of the contract, and advised tribal officials that the tribe was considered to be a member of the former Northern Indian Confederacy, and as such, could prosecute their claims against the United States under the provisions of a bill, H. R. 7047, then pending in Congress.

H. R. 7047 was a bill to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of the Northern Indian Confederacy. This Department, under date of

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August 26, 1942, made an adverse report on H. R. 7047 and also upon H. R. 4044, a bill for the same purpose in the 78th Congress. Both of these bills failed of enactment. A similar bill has not been introduced in the present Congress. For your information, I am enclosing a copy of the report dated August 26, 1942, on H. R. 7047. Your particular attention is directed to the first paragraph on page 2 of the report, pointing out that a number of tribes who would be affected by the bill, among them the Seneca Tribe, have already had their claims adjudicated by the Court of Claims.

The foregoing is for your information only. This Department has no intention of refusing to approve the employment of an attorney or attorneys by the Seneca-Cayuga Tribe on the ground that we have no information regarding their claims or that the claims are not believed to be justifiable. On the contrary, if the Indians believe they have valid claims and desire to retain the services of counsel to develop such claims on a contingent basis, this Department will interpose no objection if the interests of the Indians are properly protected. For the reasons hereinafter stated, however, I am loath to approve the contract now here and it is returned herewith.

The contract provides "and said attorneys shall also represent any individual member or members of said tribe who may have any claims of whatsoever nature growing out of any treaties or laws of Congress, or otherwise." The tribe is not authorized to employ counsel for the prosecution of claims of individual Indians. Such contracts must be executed between the individual Indians and the attorneys and approved by this Department if payment of fees or expenses out of restricted funds under the control of this Department is contemplated.

In the first paragraph beginning on the second page of the contract, concerning compensation, there is no recital that the compensation for the services under the contract is to be wholly contingent upon a recovery for the Indians. In line three of the same paragraph, the word "equitable" should be "equitably." In line 8 of the same paragraph, the word "or" following the word "action" should be "of."

The contract provides that it shall continue in force and effect for a period of five years, beginning with the date of its approval by the Secretary of the Interior. This provision unquestionably contemplated that the contract would be presented to

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the Secretary in due course, as is required by the regulations. No explanation of the delay of over four years in presenting the contract for approval has been offered.

I shall be glad to consider a contract between the Seneca-Cayuga Tribe and yourselves which does not contain the foregoing objections. Apparently it would be desirable to renegotiate the contract as the most practicable method of removing the objections. I am, therefore, enclosing a form of attorney's contract which, with but slight modification, will be adequate for the purpose.

A copy of this letter is being directed to the Seneca-Cayuga Tribe through the Superintendent of the Quapaw Agency, Miami, Oklahoma.

Sincerely yours,

(sgd.) Oscar L. Chapman  
Assistant Secretary

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