



## INTERIOR BOARD OF INDIAN APPEALS

Delaware Tribe of Western Oklahoma v. Acting Deputy Assistant Secretary -  
Indian Affairs (Operations)

10 IBIA 40 (07/30/1982)

Also published at 89 Interior Decisions 392

Judicial review of this case:

Affirmed, *Wichita & Affiliated Tribes of Oklahoma v. Clark*, No. 83-0602  
(D.D.C. Jan. 25, 1985)

Affirmed, 788 F.2d 765 (D.C. Cir. 1986)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

DELAWARE TRIBE OF WESTERN OKLAHOMA

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-6-A

Decided July 30, 1982

Appeal from decision by Acting Deputy Assistant Secretary--Indian Affairs (Operations) apportioning income from restored lands among three Indian tribes.

Reversed.

1. Indian Lands: Ceded Lands: Restoration

Restoration of ceded lands to tribal ownership under sec. 3 of the Indian Reorganization Act of June 18, 1934, held not to require apportionment of income from restored lands on the basis of populations at the time of cession.

APPEARANCES: Jap W. Blankenship, Esq., and Margaret McMorrow-Lowe, Esq., for appellant; Anne Crichton, Esq., Office of the Solicitor of the Department of the Interior, for appellee; Patricia L. Brown, Esq., for intervenor Wichita and Affiliated Tribes; Rodney J. Edwards, Esq., for intervenor Caddo Tribe of Oklahoma. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Factual and Procedural Background

On September 17, 1963, an order issued by Assistant Secretary John A. Carver, Jr., restored 2,306.08 acres of ceded lands to appellant Delaware Tribe of Western Oklahoma (Delaware Tribe) and intervenors, Wichita and Affiliated Tribes (Wichita Tribe) and Caddo Tribe of Oklahoma (Caddo Tribe). <sup>1/</sup> The order provides, in pertinent part:

Whereas, under an agreement of June 4, 1891, ratified by the Act of March 2, 1895 (2[8] Stat. 876, 894-898), the Wichita and Affiliated Bands of Indians ceded certain lands to the United States, and in return received allotments and other considerations, and;

Whereas, certain of the lands have been reserved and set aside for use of the Bureau of Indian Affairs for school, agency, cemetery and other administrative purposes, and;

Whereas, the Indians, through their tribal council, and the Commissioner of Indian Affairs, have recommended that certain lands in such reserves be restored to tribal ownership, and;

Whereas, such lands, hereinafter described, are surplus to the needs of the Bureau of Indian Affairs for administrative purposes:

Now, therefore, by virtue of the authority contained in Section 3 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 463), I hereby find that restoration to tribal ownership of the following-described ceded lands is in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma), and are added to and made a part of the existing reservation, subject to any valid existing rights: [real property description omitted.]

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<sup>1/</sup> 28 FR 10157 (Sept. 17, 1963). A subsequent order, substantially identical in language, restored an additional 50.93 acres to the three tribes on June 13, 1973. 38 FR 16065 (June 13, 1973).

Prior to issuance of the restoration order, in correspondence dated May 31, 1963, the Assistant Secretary explained the meaning and intended effect of the order of September 17, 1963:

In response to your teletype of April 3 the order which would restore 2,306.08 acres of land to the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma,) is still in the process of preparation by the Bureau of Land Management.

The lands to be restored were conveyed to the United States by the Wichita and Affiliated Bands of Indians, acting as one entity, under the agreement of June 4, 1891, ratified by the Act of March 2, 1895, (28 Stat. 876, 894-898). Under Article II of that agreement the individual members of these Bands were recognized and allotted as if they belonged to one tribal group.

The authorization for restoration, dated January 25, 1963, contemplated that the lands would be restored to the Wichita Band and Affiliated Bands as one group so that each member of the Wichita Band, Caddo Tribe and Absentee Band of Delaware Indians will share equally in the benefits to be derived therefrom.

In order to effectively manage this property, it is expected that the three groups will jointly form an entity acceptable to the Secretary of the Interior, and legally capable under the state law of holding, managing and disposing of real property.

The Director, Bureau of Land Management is being instructed, by copy of this letter, to prepare the restoration order in such a manner as to clearly indicate that the land is being restored to the Wichita and Affiliated Bands as one group. [2/]

On September 10, 1970, the Department commented on the administration of the restored lands when the Anadarko Field Solicitor furnished an opinion concerning the effect of the 1963 order restoring the ceded lands to tribal ownership.

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2/ Letter to Will J. Petner from John A. Carver, Jr., dated May 31, 1963.

[A] controversy has developed between the Caddos, Wichitas and Absentee Band of Delaware Indians over the degree of participation of each of the three tribal groups in the management of the restored lands and the income which it produces, it being the position of the Caddo Tribe that both the management and shares in the income should be based upon an individual tribal membership basis rather than upon a tribal basis. Under the present arrangement each tribe provides equal representation to the intertribal land management committee which administers the restored lands, and each of the tribes share equally in the income derived therefrom, one-third thereof being credited to each tribe. It is the position of the Caddo Tribe, you state, that based upon the membership of each tribe the tribes should participate in the membership of and share in the income derived from the restored lands upon the basis of 63 percent Caddo, 22 percent Wichita, and 15 percent Delaware, such percentages reflecting the proportion of each tribe's membership to the total membership of the three tribes, such being the basis contemplated by the language of the paragraph in Secretary Carver's letter quoted above. [3/]

The Field Solicitor offered the following opinion:

My interpretation of the language of Secretary Carver's letter is that it was the intention of the restoration action that the three tribes which comprise the Wichita and Affiliated Bands are to be considered as one group for purposes of administration of the land and the division of the proceeds derived therefrom rather than as three separate tribal groups. Under that interpretation, which appears to me to be the only one possible, it was contemplated that the responsibility of management and the sharing of benefits would be upon the basis of the individual members of the three tribal groups and not upon a basis of tribal equality, so that for such purposes the fact that there are three tribal groups involved would be disregarded and all tribal members considered as members of one group rather than of their particular tribes. [4/]

The matter then came before the Commissioner of Indian Affairs 5/ for review. In a memorandum decision dated October 4, 1972, Commissioner Louis R.

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3/ Letter opinion to Andrew Dunlap from Lyle R. Griffis dated Sept. 10, 1970.

4/ Id. at 2.

5/ Appellee is the successor to the Commissioner.

Bruce adopted the 1970 Field Solicitor's opinion for the Department, concluding:

To elaborate further, the management of the land can only be effected by a joint entity of the three groups. We do not believe there can be an equal division of the proceeds as three separate tribal groups unless this is mutually agreeable to the group. As the Field Solicitor has pointed out, for the purposes of administration and distribution of proceeds the fact that there are three tribal groups must be disregarded and all tribal members considered as members of one group. [6/]

From 1970 until 1977 the three tribes affected by the land restoration agreed by joint resolutions, which were approved by the Department, to divide the income from the lands equally. Funds for the operating expenses of the management agency established to administer the funds were also derived from the income of the restored land. 7/

On April 23, 1980, the Acting Deputy Commissioner notified the three tribes that the matter of apportionment of income from the restored lands had again come under Departmental review. Because of dissatisfaction with the equal distribution system which had been adopted by the tribes, comments were solicited from them concerning a Solicitor's Opinion dated September 7, 1979, which proposed to divide the income among the three tribes according to a formula derived from the estimated population of the tribes' predecessor organizations in 1891. On August 5, 1981, appellee Acting Deputy Assistant

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6/ Memorandum decision dated Oct. 4, 1972, "Subject: Administration of Land Restored to the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma)."

7/ Exhs. D-1 through D-11, Notice of Appeal. Appellant's Reply Brief at page 2 asserts that the entire period from 1963 to 1979 was administered in this fashion.

Secretary--Indian Affairs (Operations), devised a new apportionment plan as follows:

Accordingly, I hereby determine that the income derived from the restored lands shall be apportioned among the three Tribes on the basis of their population stated on page 352 of the Report of the Commissioner of Indian Affairs dated October 1, 1891. The figures from such report show that the three Tribes had a population of 1,066 persons, broken down as follows:

	<u>No.</u>	<u>Percent</u>
Wichita and Affiliated Tribes		
Wichitas	175	
Towaconies	150	
Wacoos	35	
Keechies	<u>66</u>	
Total for Wichita	426-----426	39.36
Caddo	545	51.13
Delaware	<u>95</u>	<u>8.91</u>
Total	1,066	100.00

The income derived from the restored lands is to be divided among the three successor Tribes according to the percentages shown in the above chart. Such division is to be retroactive to the date of restoration in 1963 and will include income from land restored to the three Tribes since that date. Separate accounts for each Tribe are to be created and all income from the jointly held land is to be deposited to such accounts as it is received.

In that funds from the joint account have been advanced to each of the three Tribes during the past several years, it will be necessary to make adjustments in order to conform to this memorandum. I am asking the Trust Fund Branch in the Central Office to establish the three accounts and make necessary adjustments to implement this decision. In computing the adjustments, the Trust Fund Branch will contact your office to assure there is agreement on what each Tribe is to receive. [8/]

It is from this decision that relief is sought by appellant.

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8/ Memorandum decision of Acting Deputy Assistant Secretary--Indian Affairs (Operations) dated Aug. 5, 1981, Subject: Wichita, Caddo and Delaware--division of jointly held funds.

Oral Argument Denied

Each of the tribes affected by the decision of August 5, 1981, has appeared through briefs filed by counsel, as has appellee. Intervenor Wichita Tribe requests oral argument. Appellant opposes this application on the grounds that oral argument would unnecessarily delay decision of a matter of law already adequately presented by the briefs filed on appeal. The Board finds the record, as constituted, adequate to permit decision without further argument by counsel. Accordingly, the application for oral argument is denied.

Expedited Consideration Allowed

The Wichita Tribe has also moved for expedited consideration of this appeal because distribution of income from the restored lands has been halted since 1979 pending a final Departmental decision. This appeal has been before the Board since October 1981. The administrative record on appeal was not received until December 10, 1981. The case has been ripe for decision since June 7, 1982. The tribe states that the restored lands provide its only source of income. Appellant also represents the lands to be a primary source of operating revenue which is now withheld pending decision on this appeal. Based upon these unchallenged representations, the Board grants expedited consideration.

Issues on Appeal

Although the parties all characterize it differently, the issue on appeal is clearly whether the August 5, 1981, decision to apportion income

from restored lands on the basis of the 1891 population of the three tribes was correct. Ancillary to this main issue is the question whether it is proper to compel repayment by two of the tribes of payments earlier obtained.

### Parties' Contentions

Appellant Delaware Tribe contends that income on hand and to accrue in the future from the restored lands should be apportioned among the three tribes on the basis of their respective current memberships. Appellee's position is that 1891 populations should be used as the basis for apportionment of the fund. Citing a 1979 Associate Solicitor, Indian Affairs, opinion appellee concludes: "The lands in question were restored rather than conveyed to the tribes in 1963. Therefore, the present interest the tribes have can only be the same as they had in the lands prior to cession." <sup>9/</sup> (Emphasis in original.) Intervenors generally support appellee's position. <sup>10/</sup>

As to past payments to the tribes which were made in equal shares without regard to tribal members, appellant argues equal division was proper and any overpayment which would be due if a division based upon populations

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<sup>9/</sup> Appellee's Brief at 6. The Associate Solicitor's opinion relied upon is dated Sept. 7, 1979. It appears the author of that opinion may not have seen either the 1963 Carver letter or the 1972 Bruce decision before rendering advice, since neither document is discussed.

<sup>10/</sup> Caddo Brief at 8, 13; Wichita Brief at 2, 16; but see Wichita Brief at 22 where the tribe offers in the alternative to agree to an equal division of moneys on a tribal basis as being "more workable and supportable in IRA language and precedent" than the current populations basis sought for by appellant. The Wichita Tribe also argues that Court of Claims and Indian Claims Commission cases should be relied upon as precedent to justify an historical approach to apportionment using 1891 populations as a base.

were ordered should not require reimbursement of excess payments. Appellant reasons that since equal division of funds was mutually agreed upon by the tribes and approved by the Department without limitation, a decision to proceed based upon tribal populations should be made to apply only prospectively. Appellee argues by analogy to principles of trust law that the trust responsibility requires retroactive application of the apportionment formula. Intervenor Caddo Tribe supports this position.

### Discussion and Decision

[1] The restoration order of September 17, 1963, is expressly made under the authority of section 3 of the Indian Reorganization Act of June 18, 1934 (Act or IRA), 48 Stat. 984, as amended, 25 U.S.C. § 463 (1976), which provides, in pertinent part:

(a) The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States:

The legislative history of the IRA makes it clear that the statute was intended to address current problems of existing tribes. The committee report accompanying the Act when it came before Congress, explained that the IRA sought

(1) [t]o stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.

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(3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.

(4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations. [11/]

Commenting upon section 3 of the Act, the report states:

When allotment was carried out on various reservations, tracts of surplus or ceded land remained unallotted and were placed with the Land Office of the Department of the Interior for sale, the proceeds to be paid to the Indians. Some of these tracts remain unsold and by section 3 of the bill they are restored to tribal use. [12/]

The administration's support for this purpose is evidenced in a letter from President Roosevelt to Senator Wheeler, the sponsor of the bill: "The continued application of the allotment laws, under which Indian wards have lost more than two thirds of their reservation lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated." 13/

The legislative history reveals that the purpose of the IRA was not to return tribes of Indians to the position in which they found themselves at the end of the 19th century while the allotment Acts were being actively implemented by the Department. To the contrary, the declared purpose of the

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11/ S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934).

12/ Id. at 2.

13/ Id. at 4.

IRA was to end the individual allotment of tribal lands and to invigorate existing tribal governments. Section 3 of the Act does not, therefore, require restoration to an historical status existing at or prior to the time of the creation of the reservation of the three tribes involved in the dispute. 14/

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14/ Appellant urges this construction as follows:

“It was not the intent or purpose of the IRA to look to the last century and dwell upon technical aspects of real property law which might have applied to events of that bygone era. Instead, it was prospective legislation aimed at improving the lives and destinies of Indian people.

“The intent of the IRA was ‘to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.’ Mescalero Apache Tribe vs. Jones, 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73rd Cong. 2d Sess. 6 (1934). And in Morton vs. Mancari, 417 U.S. 535, 542 (1974), the Supreme Court said:

“‘The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.’

“In attempting to address the existing needs of Indian people, several provisions of the IRA were expressly designed to develop Indian lands and resources and to augment Tribal land bases. Section 3 of that Act is one of the provisions enacted in the furtherance of such purposes. There is nothing in the IRA or its legislative history, and particularly in the language ‘to restore to tribal ownership’ appearing in Section 3 of the Act, which even remotely suggests that the Secretary was limited to restoring lands in the narrow and literalistic fashion suggested in the Solicitor’s Memorandum. To the contrary, when other pertinent sections of the IRA are read in conjunction with the language of Section 3, it becomes obvious that the Secretary, or his designate, was vested with broad discretion in determining the manner and for whose benefit the subject lands were to be held.

“Thus, Section 5 of the IRA (25 U.S.C. §465) authorizes the Secretary, in his discretion, to acquire any interest in lands, within or without existing reservations, for the purpose of providing land for Indians. Section 5 then continues that:

“‘Title to any lands or rights acquired pursuant to sections 1, 2, 3, 4, 5, 6-10, . . . of this title shall be taken in the name of the United States in trust for the Indian tribe for which the land is acquired . . . (Emphasis supplied)’

“And Section 7 of the IRA (25 U.S. §467) provides the following:

“‘The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 1, 2, 3, 4, 5, 6-10, . . . of this title, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations. (Emphasis supplied)’

As does the IRA, the order of September 17, 1963, also seeks to address the current problems of three existing tribes. The Assistant Secretary's 1963 letter of explanation speaks of the tribes as constituted in 1963, the date of the writing, when it describes a plan to "form an entity" to manage the land and to distribute income from the property "so that each member [of the three present-day tribes] will share equally in the benefits." Clearly, the Assistant Secretary neither contemplated a division of funds to the original allottees of the reservation nor proposed to exclude tribal organizations from participation in the plan. He intended rather that a tribal management scheme be designed, to be managed by the tribes, which would equalize individual benefits of living tribal members. <sup>15/</sup>

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fn. 14 (continued)

"Because of the references in Sections 5 and 7 to Section 3 of that Act, these three sections of the IRA are pari materia and must be construed together. When this is done, it is very clear that Section 3 is but one of several means by which the Secretary may 'acquire' lands for the use and benefit of present-day Indian tribes; and, regardless of the manner of acquisition of such lands, that the Secretary is vested with broad discretion in declaring for whose benefit and in what manner the lands are held. Indeed, if such facts should be present in a given matter, it appears that the language of the above cited sections of the IRA are sufficiently broad whereby the remaining surplus lands of a reservation previously occupied by a tribe which was later terminated or is otherwise extinct could be 'restored to tribal ownership' by the Secretary proclaiming such surplus lands to be held in trust for a modern-day tribe having no historical relationship or connection with the aboriginal group which previously occupied the reservation." (Appellant's Opening Brief at 9-11). See also Appellant's Reply Brief at 13-18.

<sup>15/</sup> As appellant points out at pages 12 and 18 of its reply brief, it is by no means clear from the record on appeal that the 1891 or 1895 tribal populations were allotted on the reservation created for the three tribes, nor is it certain that the three present day tribes are the hereditary successors to all the bands of Indians who were present in 1891 on what later became the reservation. This common error is shared both by appellee's arguments seeking to find an historical basis for concluding that apportionment of current incomes may rationally be based upon 1891 population estimates, and Intervenor Wichita Tribe's references to Court of Claims and Indian Claims Commission decisions for the same conclusion.

The obvious meaning of the September 17, 1963, order was recognized again in the Anadarko Field Solicitor's opinion which was adopted by Commissioner Bruce as the Departmental position in 1972. Commissioner Bruce's decision reiterated the 1963 explanation made by Assistant Secretary Carver in holding that the three existing tribes were to share in income from restored lands in proportion to tribal enrollments of members and for the benefit of living tribal members. 16/

The 1963 and 1972 interpretations of the 1963 order restoring the surplus lands to the three tribes are consistent with one another and with the language of the order. They are also consistent with the declared intent and the apparent effect of section 3 of the IRA, because the decision to restore these former school lands to the tribes to share proportionately according to population is consistent with the Act's purpose to foster tribal organizations surviving in 1934 and to encourage tribal independence and continued tribal existence. Therefore, the August 5, 1981, decision to apportion income upon historical instead of current tribal memberships erroneously reversed the prior consistent position of the Department. Division of current and future funds should be based upon the current relative populations of each tribe at the time the funds accrue. 17/

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16/ See note 6.

17/ Since the populations and the determination of tribal membership have not been constant, a number of variants are suggested by the record: (1) The population in 1891 as determined by Departmental estimate; (2) the population in 1901 when allotments of the reservation were made; (3) the population in 1963, the date of restoration or; (4) the current population of the three tribes. The parties have presented material concerning constitutional membership provisions and enrollment practices peculiar to each tribe. While 43 CFR 4.1(b)(2) (the delegation of Secretarial authority to this Board) places resolution of disputes concerning tribal enrollment beyond the competence of the Board, disposition of this appeal is not dependent upon analysis

The second issue is whether the tribes may be required to redistribute funds that have already been disbursed. The August 5, 1981, decision ordered that the new division based upon 1891 populations be given effect from 1963. The decision also ordered appropriate "adjustments" to be made to the accounts of the three tribes.

From 1970 through 1977, the three tribes enacted joint resolutions governing the division of income from the restored lands. <sup>18/</sup> Under the terms of these resolutions, the tribes shared equally in the income to be divided among them. Thus, the 1981 order apparently requires reimbursement to the Caddo Tribe of those amounts "overpaid" to the other two tribes by use of an equal one-third distribution.

During the period from 1971 to 1979, during which the tribes received equal distributions, all three tribes were, of course, aware of the terms of the 1963 order and of the Departmental position that the order required distribution of funds according to relative populations of the three tribes "as one group." <sup>19/</sup> Each tribe was aware of the relative position of its membership to the memberships of the other two tribes. Despite unequal tribal populations, each tribe agreed to an equal division of funds.

The Department also knew the population status of the three tribes. The Departmental position concerning division of the income fund during this

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fn. 17 (continued)

of tribal enrollment matters. It is assumed the three tribes have authority to determine their own memberships. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); 25 CFR 41.2.

<sup>18/</sup> Exhs. D-1 through D-9, Notice of Appeal.

<sup>19/</sup> See note 6.

period directed that division of the fund should be made on the basis of population, and that "management of the land can only be effected by a joint entity of the three groups." 20/ Despite this policy statement, the Department permitted an equal division of the fund because it was "mutually agreeable to the group." 21/

The record on appeal establishes that equal payments to the three tribes were made from 1971 to 1979 with the written consent of the tribes affected and approval of the Department. There was no mistake in fact or law, for all parties knew that the Department had ordered division of the funds based upon the relative populations of each tribe. The Department's position concerning this basic premise has been consistent with only the manner of applying the principle subject to variation. The Board holds that the 1963 order requires division of the fund based upon current populations, without exception, to funds on hand and accruing. Funds previously obtained by the tribes under joint agreements must go undisturbed. 22/

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20/ Id.

21/ Id.

22/ Appellant's Reply Brief at pages 37-39 refutes the legal arguments advanced in support of the decision to compel repayment:

"A mutual mistake is deemed to be one which is common to all parties to a contract, that is, that each party was laboring under the same misconception. Anderson Brothers Corporation v. O'Meara, 306 F.2d 672 (5 Cir. 1962). The Delaware Tribe was not laboring under any misconception as to the position of the Government that the division was to be on the basis of population absent an agreement otherwise among the Tribes. Likewise, the Delaware were not mistaken as to its ability to mutually agree with the others to a 1/3 apportionment of the income from the land. Indeed, the memorandum of Louis R. Bruce dated October 4, 1972, to the Area Director, Anadarko Area, specifically sets forth the ability of the parties to mutually agree to a 1/3 distribution of the income.

"The party attempting to reform or rescind a written contract by oral evidence of mutual mistake bears the burden of establishing by the clearest and strongest possible proof the true terms of the agreement. Otto v. Cities Service Co., 415 F. Supp. 837 (W.D. La. 1976).

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Appellant has asked the Board to fashion a plan for ascertaining the exact populations of each tribe, and to schedule periodic reviews of the plan for division of funds. It is not a proper function of this Board to devise and direct a detailed plan for administration of the income fund. The jurisdiction of this Board is limited to decision of legal disputes within the Board's competence as defined by Departmental regulation. Matters of policy

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fn. 22 (continued)

“The court in Hoffa v. Fitzsimmons, 499 F.Supp. 357 (D.C. 1980), addressed the question of mistakes of fact or law in situations where one party controls access to or knowledge of the facts with respect to the second party. Acknowledging that a contract can be cancelled or modified only if the mistake was mutual or attributable to both parties, the court held that where one party is the source of the other's knowledge of the relevant facts, there cannot be a mutual mistake. Here, according to the brief of the Wichita, the Department was the underlying source of any mistake that occurred. The Department being the sole source of the mistake, a mutual mistake cannot occur. Likewise, it is horn book law that a unilateral mistake of law or fact does not entitle the person in error to the relief requested. Eastman v. United States, 257 F.Supp. 315 (S.D. Ind. 1966); E.F. Hutton and Company, Inc. v. Schank, 456 F.Supp. 507 (D. Utah 1976). Thus, even if the Wichitas were laboring under some misapprehension, there is no allegation that the Delaware Tribe was in any way responsible for any mistake, either unilateral or mutual or of law or of fact, that may have arisen. Cancellation or reformation of a contract may not be decreed against parties whose conduct did not contribute to or induce the mistake and who will obtain no unconscionable advantage from any mistake. Centex Construction Co. v. James, 374 F.2d 921 (8 Cir. 1967).

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“The Wichita also argue that the apportionment agreements are invalid because they were not a voluntary and knowing relinquishment of rights, citing Shoshone Tribe v. United States, 299 U.S. 476 (1937). The factual background in the Shoshone Tribe case is clearly distinguishable. That case dealt with the rights of the Northern Arapaho Tribe to an interest in the Wind River Reservation previously granted to the Shoshone Tribe. It was particularly pertinent to the decision of that court that the Shoshone Tribe had always vigorously protested the presence of the Northern Arapaho on the reservation and that the government had acted unilaterally in placing the Northern Arapahoes on the reservation without the consent of the Shoshone and in direct violation of the language of the treaties. That case is wholly distinguishable from the instant facts where the Wichita voluntarily entered into the apportionment agreements while possessing all of the same knowledge and facts as were possessed by the other two Tribes. The Wichita Tribe was free to enter into such arrangements and now cannot be heard to contend that its acts were not ‘voluntary.’”

and administration are, for practical as well as legal reasons, outside the area in which the Board is designed to function. 23/

Accordingly, the record is remanded to appellee for appropriate action consistent with this opinion. Appellee is instructed to apportion income from restored lands between the three tribes on the basis of current populations of the three tribes, as ascertained by the Bureau of Indian Affairs. 24/ The order of August 5, 1981, is reversed.

This decision is final for the Department.

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//original signed  
Franklin D. Arness  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative judge

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//original signed  
Jerry Muskrat  
Administrative Judge

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23/ 43 CFR 4.1; 25 CFR 2.19; and see St. Pierre v. Commissioner, 9 IBIA 203, 89 I.D. 132 (1982); and Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary, 9 IBIA 254, 89 I.D. 196 (1982).

24/ Appellant advances an alternative argument to the effect that, absent tribal agreement concerning division of the fund, the Department lacks authority to disburse moneys to the tribes owing to the limitation imposed by the Act of Mar. 3, 1883, 22 Stat. 590, as amended, 25 U.S.C. § 155 (1976). The annual Departmental appropriations act (as appellee points out) customarily empowers the Department to authorize the advance of tribal funds for approved uses.